

# CONSTITUTIONAL PROMISES OF INDIGENOUS RECOGNITION: CANADA, VANUATU AND THE CHALLENGES OF PLURALISM

## I. INTRODUCTION

Multiculturalism and 'de-colonialism' have brought an ever-stronger awareness of the pluralism underlying modern legal realities. Most acutely, Indigenous peoples' demands for recognition of culture and prior connection often come with a reassertion of customary laws<sup>1</sup> and customary entitlements.<sup>2</sup> Yet meaningful accommodation of these, within a dominant western legal system, is an enormous challenge. Often the difficulties seem to have been underestimated; across the years even countries and institutions well-disposed to customary laws have periodically fallen into the trap of treating them as akin to state laws (or foreign laws with local equivalents)<sup>3</sup> and expecting them to behave in the same way.<sup>4</sup> When they did not, or as oral traditions did not lend themselves to western proof,<sup>5</sup> it was tempting to fall back on a denial of their character (as law) or their capacity to create tangible rights.<sup>6</sup> Accordingly, recognition of customary laws often remained aspirational, and past advocacy often lingered on questions about character, compatibility, veracity and certainty.<sup>7</sup> Today, it is more widely accepted that customary laws *are* law<sup>8</sup> and cognisable as such<sup>9</sup> (albeit with deeper roots and different means of transmission and manifestation), and that the perceived disadvantage of 'uncertainty' is an invention of western perspective.<sup>10</sup> Accordingly, discussions have diversified and deepened.

There has been broad discussion in various jurisdictions on the importance of promoting the revitalisation of customary laws, on the need to move recognition

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<sup>1</sup> Used broadly here to mean Indigenous laws, traditions and custom (or 'kastom' as it is increasingly referred to in Vanuatu).

<sup>2</sup> On the difficulties of definition see, eg, Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report No 31, 1986) 98-101; New Zealand Law Commission, *Converging Currents – Custom and Human Rights in the Pacific* (Study Paper 17, 2006) paras 4.23-4.30; see also John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press Incorporated 2010) 51-55.

<sup>3</sup> [reference deleted for author anonymity]

<sup>4</sup> See further [reference deleted for author anonymity].

<sup>5</sup> On the complexities of proving customary law see, eg, [reference deleted for author anonymity].

<sup>6</sup> See, eg, [reference deleted for author anonymity].

<sup>7</sup> See generally John Borrows, 'Indigenous Legal Traditions in Canada' (2006) Report for the Law Commission of Canada, v; John Borrows, *Canada's Indigenous Constitution* (n 2) 12, 56; New Zealand Law Commission, *Converging Currents – Custom and Human Rights in the Pacific* (n 2) para 4.6.

<sup>8</sup> See, eg, Brian Z Tamahana, Caroline Sage and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012); John Borrows, 'Indigenous Legal Traditions in Canada' (n 7).

<sup>9</sup> See John Borrows, 'With or Without You: First Nations Law (in Canada)' (1996) 41 McG LJ 629.

<sup>10</sup> See further, eg, [reference deleted for author anonymity].

beyond mere aspiration, and on the problems of framing the exercise within western law perspectives.<sup>11</sup> This article touches on these issues, but focusses on the practical mechanics of recognition. Our specific interest is the implementation of *constitutional* recognition – a setting which brings a socio-political depth to the challenges and a measure of indelibility to the outcomes.

Two conspicuous attempts at contemporary constitutional recognition are found in Canada and Vanuatu. Section 35(1) of the Canadian Constitution Act 1982 recognises and affirms the ‘existing *aboriginal* and treaty rights of the aboriginal peoples of Canada’.<sup>12</sup> In Vanuatu, the Constitution commences with a commitment to ‘cherishing .... ethnic, linguistic and cultural diversity’<sup>13</sup> and the enacting provisions expressly state that customary laws ‘shall continue to have effect as part of the law of the Republic’.<sup>14</sup> This article examines the histories of these initiatives and traces each country’s struggle to translate bold constitutional promises to legal reality.

In Canada, the colonial history and modern context has produced contemporary constitutional recognition of ‘aboriginal rights’. In Vanuatu, with its different complex story, it is customary laws themselves that are recognised. ‘Customary law’ significantly overlaps with the emanations of customary law affirmed as ‘rights’ in Canada, and similar challenges underlie both sets of broadly drawn provisions. Yet, with some methodological risk, we are certainly comparing different stories – as the differing constitutional provisions might suggest. Vanuatu (formerly the New Hebrides) is a small island country,<sup>15</sup> where the Indigenous peoples (known collectively as Ni-Vanuatu) form the majority of the population.<sup>16</sup> Canada, on the other hand, is one of the largest countries by land mass,<sup>17</sup> but the Indigenous population constitutes a small minority (in part because of past colonial

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<sup>11</sup> In the Canadian context, see Truth and Reconciliation Commission of Canada, ‘Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada’ (2015); John Borrows, *Freedom & Indigenous Constitutionalism* (University of Toronto Press 2016); Robert Y Clifford, ‘WSÁNEĆ Legal Theory and the Fuel Spill at Seletkel (Goldstream River)’ (2016) 61 McG LJ 755; Aaron Mills, ‘The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today’ (2016) 61 McG LJ 847; Hadley Friedland, ‘Waniskā: Reimagining the Future with Indigenous Legal Traditions’ (2016) 33 Windsor YB Access Just 85.

<sup>12</sup> Emphasis added.

<sup>13</sup> Constitution of Vanuatu 1980, Preamble.

<sup>14</sup> *ibid* art 95(3).

<sup>15</sup> The total land area is approximately 12,200 square kilometres and the territorial waters cover 450,000 square kilometres: Government of Vanuatu, <[http://www.governmentofvanuatu.gov.vu/index.php?option=com\\_content&view=article&id=52&Itemid=62](http://www.governmentofvanuatu.gov.vu/index.php?option=com_content&view=article&id=52&Itemid=62)>. The population is 272,459: Vanuatu National Statistics Office, ‘2016 Mini Census Report, Vol 1’ (2016) 1 <<https://vnso.gov.vu/index.php/component/advertising/?view=download&fileId=4542>>.

<sup>16</sup> About 99% of the population are Ni-Vanuatu: Vanuatu National Statistics Office, ‘2016 Mini Census Report, Vol 1’ (2016) 57 <<https://vnso.gov.vu/index.php/component/advertising/?view=download&fileId=4542>>.

<sup>17</sup> Canada is almost 10 million square kilometres in size: ‘Canada Facts’ <<https://www.canadafacts.org/>>.

policies).<sup>18</sup> The countries' relevant legal histories also differ somewhat – notably in the respective roles of conflict and agreement.<sup>19</sup> In Canada, the contemporary legal focus is ongoing exploration of land-use and self-government rights around and beyond historic regional treaties. In Vanuatu, national sovereignty belongs to the people of Vanuatu<sup>20</sup> and all land in the Republic 'belongs to the indigenous custom owners and their descendants.'<sup>21</sup> Whilst there has been the occasional power struggle between the State and traditional leaders,<sup>22</sup> the contemporary legal focus is translating the recognition of customary laws<sup>23</sup> (a somewhat inevitable product of demographics and Independence). It is also noteworthy that Canada has built a significantly larger body of relevant case law and commentary.

Importantly, it is hoped that the differences in the journeys of Canada and Vanuatu will contribute breadth and originality to our study, and ultimately provide a more complete picture of the cumulative and successive challenges at play. Moreover, there are some enticing correlations in these journeys. The most obvious and most critical is the centrality of the constitutional provisions – in each case broadly worded and bold in their aspirations. More specifically, both countries have French and English legal heritage, and retain the two official languages<sup>24</sup> and a western legal framework combining laws from both sources. Traditional communities are strong and somewhat diverse, and allegiances to local laws and community often outweigh any sense of national identity. Tension between state and customary laws is frequent in both countries. It is also notable that these countries have cross-referred to each other in the course of contemporary legal reform. The human rights chapter of Vanuatu's Constitution is modelled on the Canadian Constitution.<sup>25</sup> And the possibility of using recognition models from Pacific Island States, including Vanuatu, was raised by the Law Reform Commission of Canada in a discussion paper on Indigenous legal traditions.<sup>26</sup>

The key challenge here, through the lens of either country's experience, is not a new one. As alluded to above, the task of reconciling different legal systems

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<sup>18</sup> The 2016 census identified 4.9% of the national population as Aboriginal peoples (First Nations, Métis and Inuit): Statistics Canada, 'Aboriginal Peoples Highlight Tables, 2016 Census' (20 February 2019) <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/abotaut/Table.cfm?Lang=Eng&T=101&S=99&O=A>>.

<sup>19</sup> There are exceptions to the lack of activism in Vanuatu, particularly in the lead up to independence. See further below regarding *Nagriamel* and, eg, the discussion of *Nagriamel* in Howard Van Trease, *The Politics of Land in Vanuatu: From Colony to Independence* (Institute of Pacific Studies, University of the South Pacific 1987).

<sup>20</sup> Constitution of Vanuatu 1980, art 4(1).

<sup>21</sup> *ibid* art 73.

<sup>22</sup> See, eg, *PP v Leo* [2018] VUSC 75, discussed below.

<sup>23</sup> Constitution of Vanuatu 1980, art 95(3).

<sup>24</sup> Vanuatu has a third official language, Bislama, which is a creole language derived mainly from English: Constitution of Vanuatu 1980, art 3.

<sup>25</sup> Constitution Act 1982 (Can), enacted as Schedule B to the Canada Act 1982 (UK), which came into force on 17 April 1982.

<sup>26</sup> Law Reform Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Discussion Paper, 2006) 25.

has been challenging theorists and practitioners for many years. There are fundamental challenges arising simply from diversity: the 'constituent units of legal pluralism are distinct legal regimes, typically with separate rules, logics and practices'.<sup>27</sup> Yet in the context of Indigenous histories those challenges are often magnified by the unilateralism and injustices of the past and the political and economic imbalances of the present. Constitutional context can bring further challenges – via broad aspirational drafting, more legal 'layers', and greater political entanglement.

The Canada and Vanuatu examples illustrate well many of the broad and specific difficulties presented by pluralism – whether that is manifested (and best conceptualised) as a competition of 'systems' or of multiple worldviews within a 'system'.<sup>28</sup> The difficulties are many. What is the precise hierarchy of laws (which in a complex politico-legal history might find many sources)? How is recognition accurately achieved across different systems (built on very different worldviews)? How are local variations (or differences of view) accommodated? Is the western system to be rewarded for its past interference with customary practices? Can the western system claim some inviolability for its fundamental tenets, or priority for its own central purposes? Does the western translation (and/or attending process) inevitably carry some filtering, de-contextualisation, 'freezing' or disruption of customary laws?<sup>29</sup> Can the collaboration ever be effective when only one system is called upon to explain and justify itself? And ultimately, what is the form and purpose of recognition? Is it simply to ascertain and acknowledge the 'facts' of Indigenous legal traditions, to build evidence of pre-contact existence and practices, to identify sources of surviving rights and obligations, and/or to make space for dynamic emanations of contemporary self-government?<sup>30</sup>

As will be seen, in both countries it has largely been left to the courts to grapple with these questions and give meaning to the constitutional provisions – in a necessarily incremental and ad hoc way. In both countries, this journey is difficult and ongoing.

## II. CANADIAN HISTORY AND CONTEXT

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<sup>27</sup> Sally Engle Merry, 'Legal Pluralism and Legal Culture: Mapping the Terrain' in Brian Z Tamanaha, Caroline Sage and Michael Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 70.

<sup>28</sup> We acknowledge that Canada's pluralism arising from the marriage of common law and civil law is legally well-established — we refer here to what has been described in Canada as the further step (in relation to customary laws) from 'bi-juridicalism to multi-juridicalism': see John Borrows, 'Indigenous Legal Traditions in Canada' (n 7) iv.

<sup>29</sup> See eg Val Napoleon, 'Tsilhqot'in Law of Consent: International Indigenous Trickster Court' (2015) 48 UBC L Rev 873; Alan Hanna, 'Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective' (2013) 45 Ottawa L Rev 365, 369.

<sup>30</sup> See eg Kirsten Anker, 'Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission' (2016) 33 Windsor YB Access Just 15, 17.

### A. Constitutional foundations and the place of First Nations

The cornerstones of Canada's constitutional history include an early recognition of the existence and rights of Aboriginal peoples and attempts to centralise colonial authority to infringe on those rights. The Royal Proclamation of 1763 (which followed the Treaty of Paris<sup>31</sup> and declared the Crown's policy on British North America)<sup>32</sup> referred to the reservation of Indian Hunting Grounds in areas not 'ceded to or purchased by' the Crown, and prohibited acquisition of such land except through Crown processes.<sup>33</sup> Subsequently the Constitution Act 1867 (UK),<sup>34</sup> in distributing power between the newly-defined Canadian federal and provincial governments,<sup>35</sup> directed legislative authority over 'Indians and lands reserved for the Indians' to the new federal Parliament.<sup>36</sup> Reflected in and framed by these constitutional terms, there was a long history of treaty-making and reservation of Aboriginal lands across significant parts of Canada — driven by the colonial objectives of alliance and orderly settlement.<sup>37</sup> Yet First Nation governments long remained somewhat invisible in the constitutional structure (as interpreted and applied).<sup>38</sup> Even the precise status of underlying Aboriginal rights to land remained uncertain for many years.<sup>39</sup> The Supreme Court only clearly confirmed the existence of 'Indian title' and its common law source in the *Calder* decision of 1973.<sup>40</sup>

Discussion of constitutional reform began soon after confederation, but focussed for many years on Britain's control over amendment processes. Yet by the late 1960s discussion had turned to a more significant patriation of the

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<sup>31</sup> Signed by France, England and Spain following the Seven Years War, and the acknowledged source of colonial British sovereignty over much of Canada: *St Catherine's Milling and Lumber Co v The Queen* (1887) 13 SCR 577 (SCC), 624 and *St Catherine's Milling and Lumber Co v The Queen* (1887) 14 App Cas 46, 53 (PC).

<sup>32</sup> Note the long controversy over the extent of its application in Canada: *Calder v British Columbia (Attorney-General)* (1973) 34 DLR (3d) 145, 153-156 and 203-208; *R v Marshall*; *R v Bernard* [2005] 2 SCR 220.

<sup>33</sup> RSC 1985, App II, No 1.

<sup>34</sup> Originally enacted as the British North America Act 1867.

<sup>35</sup> 30 & 31 Victoria, c 3, ss 91 and 92, reprinted in section RSC 1985 App II, No 5.

<sup>36</sup> Constitution Act 1867 (UK) s 91(24).

<sup>37</sup> See Douglas N Sprague, 'Canada's Treaties with Aboriginal Peoples' (1996) 23 Manitoba LJ 341.

<sup>38</sup> See particularly Brian Slattery, 'Aboriginal Sovereignty and Imperial Claims' (1991) 29 OHLJ 681, 682; John Borrows, 'Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*' (1991) 37 OHLJ 537, 538; Kent McNeil, 'The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments' (1994) 7 W Legal Hist 113; and James [Sa'Ke'] Youngblood Henderson, 'Dialogical Governance: A Mechanism for Constitutional Governance' (2009) 72 Sask L Rev 29.

<sup>39</sup> Early recognition was technically uncertain: *St Catherine's Milling and Lumber Company v R* (1887) 13 SCR 577; *St Catherine's Milling and Lumber Company v R* (1888) 14 App Cas 46.

<sup>40</sup> *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145, 152 per Judson J and 200 per Hall J. See also, *Re Paulette and Registrar of Titles (No 2)* (1973) 42 DLR (3d) 8, 26-7; and see further *Guerin v The Queen* [1984] 2 SCR 335 as to developing conceptions of the nature of the 'title' and the obligations of the government.

Constitution and entrenchment of a bill of rights.<sup>41</sup> Importantly for present purposes, an assimilationist 1969 government 'White Paper on Indian Policy',<sup>42</sup> awakened and strengthened a First Nations voice<sup>43</sup> in the debates — with calls coming (particularly from the west) for greater protection of Aboriginal rights and identity by constitutional amendment.<sup>44</sup> This momentum was soon bolstered by the *Calder* decision referred to above, which crystallised the potential significance of common law Aboriginal title<sup>45</sup> and prompted renewed negotiation of claims.<sup>46</sup> When protection for Aboriginal rights did not materialise in the constitutional plans, a coalition of Aboriginal groups pressured governments with national demonstrations.<sup>47</sup> Yet there was also some *opposition* amongst Aboriginal peoples, on the basis that the proposals could result in some erosion of their nationhood and distinct legal identity.<sup>48</sup>

Ultimately, broadly cast protections did emerge: s 35 of the Canadian Constitution Act 1982 recognises and affirms the 'existing aboriginal and treaty rights of the aboriginal peoples of Canada'. This provision gave these rights constitutional status. However, the section was in many respects a 'shell without a filling',<sup>49</sup> as it does not define these 'rights' nor the nature of the protection conferred. It also failed to define what was meant by 'existing' rights.<sup>50</sup> The ensuing exploration has focussed primarily on land use rights, but the plain meaning of 'rights' is broader.<sup>51</sup> On the other hand, as will be seen this notion of 'Aboriginal rights' has become something narrower than the full manifestation of all Aboriginal traditions or laws (even in the context of land use).

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<sup>41</sup> See [reference deleted for author anonymity].

<sup>42</sup> 'Statement of the Government of Canada on Indian Policy' (Department of Indian and Northern Affairs (Ottawa) 1969) <[http://epe.lac-bac.gc.ca/100/200/301/inac-ainc/indian\\_policy-e/cp1969\\_e.pdf](http://epe.lac-bac.gc.ca/100/200/301/inac-ainc/indian_policy-e/cp1969_e.pdf)>.

<sup>43</sup> See John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (4th edn, LexisNexis Canada 2012) 93. See further Kent McNeil, 'The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments' (n 38) 118ff.

<sup>44</sup> See particularly Indian Association of Alberta, *Citizens Plus* (Indian Association of Alberta 1970); and The Union of BC Indian Chiefs, 'A Declaration of Indian Rights: The B.C. Indian Position Paper' (17 November 1970).

<sup>45</sup> Particularly for regions with a lesser treaty / agreement history.

<sup>46</sup> See eg Department of Indian Affairs and Northern Development, 'In All Fairness: A Native Claims Policy' (1981).

<sup>47</sup> See John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (n 43) 95.

<sup>48</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (n 43) esp 93. See further Peter S Vicaire, 'Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context' (2013) 58 McG LJ 607, 611.

<sup>49</sup> Ira Barkin 'Aboriginal Rights: A Shell Without the Filling' (1990) 15(2) Queens LJ 307.

<sup>50</sup> The 'cautious' inclusion of the word 'existing' appeared to be a product of provincial concerns over the potential scope of the provision: Mary Dawson, 'From the Backroom to the Front Line: Making Constitutional History' (2012) 57 McG LJ 955, 967-68.

<sup>51</sup> See the implications of cases such as *R v Pamajewon* [1996] 2 SCR 821.



The proponents and drafters of section 35 were aware of its uncertainties.<sup>52</sup> The 1982 document itself, in section 37, provided for a constitutional conference to be held soon after to discuss matters including ‘the identification and definition’ of ‘rights’. That initial conference produced clarifying amendment on specific issues,<sup>53</sup> but no substantial progress on the central issues of definition. Instead section 37.1 was added, providing for at least two further conferences. Further conferences were held between 1984 and 1987, but without significant progress on definitional issues or contested questions about self-governance.<sup>54</sup> Later negotiations produced a broad package of proposed amendments (the ‘Charlottetown Accord’)<sup>55</sup> that did address Aboriginal representation and self-government,<sup>56</sup> but in October 1992 Canadians voted by referendum to reject the Accord. Importantly, it is understood that concerns over erosion of existing nation-to-nation relations, inadequate consultation, financing issues and gender equality issues led to some significant opposition by treaty-covered First Nations peoples.<sup>57</sup>

Canada was accordingly left with little guidance on the meaning of section 35’s recognition and affirmation of ‘Aboriginal rights’. A difficult legal journey was inevitable. The task of translation and implementation has fallen to the courts — resulting in an ad hoc exploration of the issues, complex problems of reconciliation with common law precedent, concerns over the cultural competence of legal professionals,<sup>58</sup> and debates over conflation of legal, moral and political questions in the pursuit of a workable constitutional compromise. This struggle (traced later in this article) is an important case study on western law’s practical receptivity to customary laws and the challenges of legal pluralism.

### *B. Pre-existing recognition of customary laws*

To complete the background to Canada’s section 35 we should reflect briefly on how customary laws have been dealt with more generally. The deeper history of Canada, as for many settler-colonial countries, is filled with successive

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<sup>52</sup> See [reference deleted for author anonymity].

<sup>53</sup> Namely the extension of ‘treaty rights’ to new land claim agreements and a confirmation of gender equality in the s 35 guarantee (see s 35 (3) and (4)); and the inclusion of an Aboriginal consultation provision (s 35.1).

<sup>54</sup> As to the proposals discussed and what was achieved see Kent McNeil, ‘The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments’ (n 38) 28-29; Paul Chartrand, ‘Background’, in Paul Chartrand (ed), *Who are Canada’s Aboriginal Peoples?* (Purich Publishing 2002) 28-29.

<sup>55</sup> ‘Consensus Report on the Constitution, August 28’ (August 28 1992) Final Text, <<http://www.solon.org/Constitutions/Canada/English/Proposals/CharlottetownConsensus.html>>.

<sup>56</sup> See generally Kent McNeil, ‘The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments’ (n 38) 129ff; [reference deleted for author anonymity].

<sup>57</sup> See again Kent McNeil, ‘The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments’ (n 38) 132ff.

<sup>58</sup> See Alan Hanna, ‘Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape’ (2018) 51 UBCLR 105, 146ff.

assimilationist policies that left little room for engagement with customary laws.<sup>59</sup> In recent times, despite growing understanding, that engagement has remained somewhat specific and limited.

In the absence of any general legislative initiative, various statutes have referenced specific customary laws for particular purposes<sup>60</sup> — notably (but controversially)<sup>61</sup> the many iterations of the current Indian Act 1985. More broadly, First Nations' federally-legislated on-reserve 'jurisdiction' (relating to matters such as membership, public order, land and resource use)<sup>62</sup> is a potentially important conduit for customary principles. Yet in this context those principles tend to be confined and filtered by the imposition of western processes.<sup>63</sup>

A number of treaties also provide some specific recognition of customary laws and rights. 'Treaty rights' are now 'recognized and affirmed' under section 35 (along with 'Aboriginal rights'), underlining their enforceable nature.<sup>64</sup> Examples of customary law recognition, and indeed authority to practise and develop those laws, can be found both in colonial treaties (typically formalising purchase and reservation of lands, alliances, and/or peace agreements)<sup>65</sup> and modern Land Claims Agreements.<sup>66</sup> Notably, in addition to the creation of reserves (often in traditional territory), many of these early and modern settlements preserve subsistence rights over surrendered lands — in terms respecting the traditional practices and customs.

The modern agreements are inevitably more specific in their definition of rights, and customary law recognition is often now somewhat subsumed by the broader attention to 'self-government'. As discussed further below, broad or

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<sup>59</sup> See generally, eg, Kirsten Manley-Casimir, 'Toward a Bijural Interpretation of the Principle of Respect in Aboriginal law' (2016) 61 McG LJ 939.

<sup>60</sup> See further Sebastien Grammond, 'The Reception of Indigenous Legal Systems in Canada', in Albert Breton et al. (eds), *Multijuralism: Manifestations, Causes, and Consequences* (Ashgate Publishing 2009) 51-52; John Borrows, *Canada's Indigenous Constitution* (n 2).

<sup>61</sup> See eg Alan Hanna, 'Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape' (n 58) 127ff.

<sup>62</sup> See the Indian Act 1985 (eg s 81) and the First Nations Land Management Act 1999 (eg s 20).

<sup>63</sup> See eg Alan Hanna, 'Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape' (n 58) 130ff; Aaron Dewitt, 'Judicial Review as a Limit to Indigenous Self-Governance' (2014) 77 Sask L Rev 205, 206.

<sup>64</sup> Canadian treaties have long been attended by debates over their meaning and intent and indeed the precise legal principles applicable to them — see eg: Douglas Sanders, 'Aboriginal Peoples and the Constitution' (1981) 19 Alberta LR 410; Brian Slattery, 'Making Sense of Aboriginal and Treaty Rights' (2000) 79 Can B Rev 196; and Kate Gunn, 'Agreeing to Share: Treaty 3, History & the Courts' (2018) 51 UBCLR 75.

<sup>65</sup> See eg the Treaty of 1760; and see *Sioui v Quebec (Attorney-General)* [1987] 4 CNLR 118 and the appeal in [1990] 1 SCR 1025.

<sup>66</sup> See eg James Bay and Northern Quebec Agreement 1975; Nunavut Land Claims Agreement 1993; Nisga'a Final Agreement 1998; Labrador Inuit Land Claims Agreement 2005. For a detailed discussion on the status of Indigenous law in modern treaties see Ghislain Otis, 'La Place des Cultures Juridiques et des Langues Autochtones dans les Traites d'Autonomie Gouvernementale au Canada' (2009) 54 McG LJ 237.



specific self-government agreements (another potential conduit for customary principles) can be negotiated as part of a comprehensive land claim,<sup>67</sup> or as a stand-alone agreement (often in the context of a reserve).<sup>68</sup> The nature and limitations of these agreements have been incrementally explored in commentary.<sup>69</sup> In British Columbia, with its lack of historic treaties, ‘shared decision-making’ agreements have also come to prominence as an attempt to build frameworks for collaboration on land management (particularly in response to the modern ‘consultation’ obligations flowing from the section 35 jurisprudence — discussed below). It has been argued, however, that these ‘shared decision-making’ agreements have generally fallen short of enabling First Nation communities to significantly contribute by reference to their own laws and customs.<sup>70</sup>

The courts have found constitutional space for the agreed recognition of customary law-making power,<sup>71</sup> and themselves provided further actual recognition of customary laws in specific contexts — including marriage, adoption, band membership and elections, and sentencing.<sup>72</sup> In the latter regard, specific initiatives include the ‘First Nations Court’ (within the Provincial Court of British Columbia) that works holistically in sentencing, recognising the unique circumstances of First Nations defendants and encouraging communities to contribute to the process.<sup>73</sup> Also in the court space, the incremental legal

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<sup>67</sup> See, eg, Nisga’a Final Agreement, proclaimed in force 11 May 2000 <<http://nisgaalisims.ca/the-nisga-a-final-agreement>>. For relevant unsuccessful challenges see *Campbell v British Columbia* [2000] 4 CNLR 1 (BCSC); and *Chief Mountain v Canada* 2013 BCCA 49. For broad discussion, see Kent McNeil, ‘The Jurisdiction of Inherent Right Aboriginal Governments’ (2007) National Centre for First Nations Governance Research Paper; Joshua Nichols, ‘A Reconciliation without Recollection? Chief Mountain and the Sources of Sovereignty’ (2015) 48 UBCLR 515. See also Douglas C Harris, ‘Property and Sovereignty: An Indian Reserve and a Canadian City’ (2017) 50 UBCLR 321.

<sup>68</sup> Government of Canada, ‘General Briefing Note on Canada’s Self-government and Comprehensive Land Claims Policies and the Status of Negotiations’ (2015) <<http://www.aadnc-aandc.gc.ca/eng/1373385502190/1373385561540>>. See also ‘Self-government’ (Government of Canada, 7 December 2018) <<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>>.

<sup>69</sup> Including in a 2016 special issue of the *McGill Law Journal* on Indigenous law and legal pluralism (vol 61).

<sup>70</sup> See generally, ‘Step by Step: Final Report for the Shared Decision Making in BC Project’ (March 2015) Simon Fraser University Centre for Dialogue Research Paper, 46 <[https://www.sfu.ca/content/dam/sfu/centre-for-dialogue/Watch-and-Discover/SDM/SDM\\_Final\\_Report.pdf](https://www.sfu.ca/content/dam/sfu/centre-for-dialogue/Watch-and-Discover/SDM/SDM_Final_Report.pdf)>; and Alan Hanna, ‘Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape’ (n 58) 134ff. The acknowledged exception is the Haida Nation agreement of 2009, seen to ensure customary law influence through the agreement terms and community membership of the decision-making council: Alan Hanna (n 58) 136ff.

<sup>71</sup> *Campbell v British Columbia* [2000] 4 CNLR 1 — discussed above.

<sup>72</sup> See generally *Campbell v British Columbia* [2000] 4 CNLR 1; Kirsten Anker (n 30) 26.

<sup>73</sup> See ‘Specialized Courts’ (Provincial Court of British Columbia, 2014) <<http://www.provincialcourt.bc.ca/about-the-court/specialized-courts#FirstNationsCourt>>. See generally Alan Hanna, ‘Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape’ (n 58) 149ff.

awakening of common law Aboriginal title (prior to section 35) entailed some common law appreciation of customary laws — but their precise role in this context remained uncertain for many years.<sup>74</sup>

Inevitably there have been conspicuous assertions of customary law authority outside of the avenues discussed above. Notable recent examples include the assertion of environmental assessment authority by the Tsleil-Waututh Nation in relation to a pipeline expansion in its traditional territory; and the introduction (without federal authority) of a Mohawk Court on the Akwesasne reserve on the Ontario/Quebec/New York borders.<sup>75</sup>

A key theme of the very significant 2015 final report of the Truth and Reconciliation Commission of Canada,<sup>76</sup> which emerged from the Commission's six years of hearings involving residential school survivors across Canada, was the importance of respecting and revitalising Indigenous legal traditions.<sup>77</sup> This acknowledgment of importance, and indeed the resurgence in fact of Indigenous legal traditions,<sup>78</sup> stand in contrast to the quite constrained *legal* accommodation of customary laws revealed by the brief review above. The section 35 framework had ushered in a potentially deeper engagement. Through the protection of specific 'Aboriginal rights' the associated customary laws might find a voice in the Constitution.<sup>79</sup> And the broader notion of 'Aboriginal title' that would re-emerge through section 35 might stimulate renewed respect for customary connections and land uses, protect a modern 'title' that could draw on a range of customary laws, and potentially build new recognition of First Nation 'jurisdiction'. Alternatively, section 35 could be read as a lesser engagement with customary laws — which were perhaps just to be sought and narrowly interpreted as the 'brute facts of Indigenous existence prior to contact'.<sup>80</sup> Certainly section 35 carries a significant responsibility in contemporary Canadian law. Some have lamented that it 'failed to reset the relationship between Indigenous peoples and the Crown'<sup>81</sup> —

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<sup>74</sup> Complicating factors (at least pre-*Calder*) included the interposition of the Royal Proclamation (conceptualised as both a source of Aboriginal interests and an expression of common law recognition), the difficulties of classifying colonies for reception of law purposes, and competing theories on whether Aboriginal title was sourced in customary law or in the fact of occupation.

<sup>75</sup> See broadly Alan Hanna, 'Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape' (n 58) 152ff.

<sup>76</sup> Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future' (n 11).

<sup>77</sup> The Commission itself had observed a range of traditional processes in its own procedure: see Law Reform Commission of Canada, *Justice Within: Indigenous Legal Traditions* (n 26); Kirsten Anker (n 30).

<sup>78</sup> See eg John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002); and more recently, eg, 2016 special issues of the *Windsor Yearbook of Access to Justice* (vol 33) and the *McGill Law Journal* (vol 61).

<sup>79</sup> At least in the form of a personal jurisdiction over the participants involved: Alan Hanna, 'Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape' (n 58) 137.

<sup>80</sup> Kirsten Anker (n 30) 25.

<sup>81</sup> See eg Brenda L Gunn, 'Moving beyond Rhetoric: Working toward Reconciliation through Self-Determination' (2015) 38 Dalhousie LJ 238, 239.

or that the Supreme Court has demonstrated a ‘tenacious unwillingness to frame Aboriginal rights broadly’.<sup>82</sup> Yet this is an evolving legal platform, and we will return later to see how it has fared.

### III. VANUATU HISTORY AND CONTEXT

#### A. *The Protectorate*

In Vanuatu, as in Canada, customary laws were in force before the arrival of foreigners, and continued to be practiced during the colonial era. The term ‘colonial’ is used loosely here as Vanuatu was never a colony; it was originally governed by England and France under a Joint Naval Commission, by virtue of a Convention signed in 1887. Some of the earliest colonial constituent laws were made under the Crown’s prerogative powers. These usually consisted of a Royal Charter,<sup>83</sup> Letters Patent<sup>84</sup> and Royal instructions.<sup>85</sup> However, due to the decline of the royal prerogative most constituent arrangements in Vanuatu were made or ratified by Order-in-Council, under the Foreign Jurisdiction Act 1890. This was expanded upon by an Anglo-French Protocol in 1906,<sup>86</sup> and later replaced by an Anglo-French Protocol signed in 1914 and ratified in 1922.<sup>87</sup> This arrangement was known as the ‘condominium’,<sup>88</sup> nicknamed locally as the ‘pandemonium’.<sup>89</sup> The 1914 Protocol underpinned the system of government until independence in 1980.

Under the Protocol, the country was administered by two High Commissioners appointed by England and France.<sup>90</sup> It established a Joint Court, with civil and criminal jurisdiction in cases between French citizens and British subjects, or optants,<sup>91</sup> and between those categories and natives.<sup>92</sup> England and France also established their own national courts.<sup>93</sup> The Protocol provided for a hotchpot of laws. English legislation and case law applied to British subjects and

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<sup>82</sup> Peter S Vicaire (n 48) 612-13, 659. See earlier John Borrows, ‘Indigenous Legal Traditions in Canada’ (n 7) vi.

<sup>83</sup> See, eg, Royal Charter establishing the colony of Fiji (UK), 2 January 1875.

<sup>84</sup> See, eg, Letters Patent constituting the office of Governor of Fiji (UK), 9 February 1929.

<sup>85</sup> See, eg, Royal instructions to the Governor of Fiji (UK), 9 February 1929.

<sup>86</sup> *Protocol between Great Britain and France Respecting the New Hebrides*, Great Britain-France, signed 27 February 1906, [1906] PITSE 2 (entered into force 20 October 1906) (‘1906 Protocol’) art 11(1); ratified by New Hebrides Order-in-Council 1907 (UK).

<sup>87</sup> *Protocol between Great Britain and France Respecting the New Hebrides*, Great Britain-France, signed 6 August 1914 (entered into force 18 March 1922) (‘1914 Protocol’) art 8(6); New Hebrides Order-in-Council 1922 (UK).

<sup>88</sup> A term used to describe a country jointly controlled by two separate political powers.

<sup>89</sup> This term was coined by Father Walter Lini, the first Prime Minister of Vanuatu and used in the title of his book, *Beyond Pandemonium: From the New Hebrides to Vanuatu* (Asia Pacific Books 1980).

<sup>90</sup> 1914 Protocol, art 2.1.

<sup>91</sup> Individuals of other nationality who opted to come under British or French jurisdiction. Opting was compulsory for foreigners: 1914 Protocol, art 1.2.

<sup>92</sup> 1914 Protocol, art 12.

<sup>93</sup> *ibid* art 20.

optants<sup>94</sup> and the French Civil Code applied to French citizens and optants ('introduced laws'). Locally made 'colonial laws' included Queen's Regulations made by the High Commissioner or Resident Commissioner and French Regulations made by their counterpart (for their respective citizens and optants), together with Joint Regulations issued by the High Commissioners for the 'maintenance of order and for the good government of the group, and for carrying the present Convention into effect'<sup>95</sup> (applying to all inhabitants).

The 1914 Protocol also provided that 'native laws and customs ... where not contrary to the dictates of humanity and the maintenance of order shall be utilised for the preparation of a code of native law both civil and penal'.<sup>96</sup> Codes were to be put in force region by region, administered by Native Courts.<sup>97</sup> A Native Criminal Code was drawn up in 1938<sup>98</sup> and Courts established over the following years. No civil code was introduced, and the Criminal Code was impliedly repealed by the Penal Code Act<sup>99</sup> (applicable to everyone). The Protocol made some provision for ascertaining custom through the employment of assessors, knowledgeable in custom, to sit with judges in the common law courts.<sup>100</sup>

Alongside these provisions, traditional leaders were often encouraged by colonial administrators to enforce customary laws as a form of social control.<sup>101</sup> More particularly, the rules of customary land holding were left in place. The common law rule that radical title to land belonged to the Crown was not applied, and legislation provided that all land, including waste land, belonged to Indigenous people.<sup>102</sup> However, during the period of dependency,<sup>103</sup> sales of perpetual titles to land were permitted (with permission of the Joint Court).<sup>104</sup>

### *B. Independence and Constitutional Recognition*

In the 1960s, disputes over land clearing for coconut plantations led to the emergence of 'Nagriamel', a protest and pro-independence movement led

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<sup>94</sup> *ibid* art 13.

<sup>95</sup> *ibid* art 7.

<sup>96</sup> *ibid* art 8.

<sup>97</sup> Jurisdiction in such courts was defined in terms of civil and criminal jurisdiction, which was not a recognised distinction in customary law, see, eg, *Joint Protocol 1914*, art 8, para 7. A monetary limit was placed on civil claims and a seriousness and penalty limit on criminal cases.

<sup>98</sup> Joint Regulation 1/1938, later replaced by Native Criminal Code 1962 (Joint Regulation 12/1962).

<sup>99</sup> Cap 135 (passed in 1981).

<sup>100</sup> *1914 Protocol*, art 11(1); *1914 Protocol*, art 8(6). See now Island Courts Act [Cap 167] (Van) s 22(2); Civil Procedure Rules 2002 (Van) rr 16.34(6), (7), 16.35(6), (7).

<sup>101</sup> See, eg, New Hebrides Order in Council 1922, sch, art 8.

<sup>102</sup> *1906 Protocol*, art 1; *1914 Protocol*, art 1.

<sup>103</sup> 'Dependency' is a general term referring to a country that is under the political control of another whether as a colony, protectorate, protected state or condominium.

<sup>104</sup> *1914 Protocol*, art 12.

by Jimmy Stevens.<sup>105</sup> Britain was in favour of granting independence, although not on the terms demanded.<sup>106</sup> France was opposed, fearing pro-independence aspirations in their mineral-rich territory of New Caledonia.<sup>107</sup> In the early 1970s the Vanua'aku Party was established, laying the seeds for a party system which has never completely 'taken' in Vanuatu.<sup>108</sup> The Vanua'aku party steered the push for independence. Yet in June 1980, Jimmy Stevens led an uprising on Espirito Santo island, objecting to the terms on which independence was planned and the Vanua'aku Party's dominance.<sup>109</sup> The rebels declared Espirito Santo's independence. As neither France nor the United Kingdom sent troops, the uprising was quelled with assistance from Papua New Guinean soldiers.<sup>110</sup>

In the meantime, on 30 July 1980, the country had become independent. The new Constitution was based on a Westminster parliamentary democracy.<sup>111</sup> However, the prevailing nationalism propelled customary laws to the top of the agenda and this was reflected in the aspirational prefatory part:<sup>112</sup>

WE, the people of Vanuatu ... CHERISHING our ethnic, linguistic and cultural diversity,  
MINDFUL at the same time of our common destiny, HEREBY proclaim the establishment of the united and free Republic of Vanuatu founded on traditional Melanesian values, faith in God, and Christian principles, AND for this purpose give ourselves this Constitution.

In addition to these resounding words, the Constitution gave specific recognition to customary laws, both aspirationally and as a primary source of law rather than a subservient element of a common law system.<sup>113</sup> Unfortunately, the complex

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<sup>105</sup> See further, Howard Van Trease (n 19); Marc Tabani, 'Political History of Nagriamel on Santo, Vanuatu' (2008) 78(3) *Oceania* 332.

<sup>106</sup> Australian Department of Foreign Affairs, 'New Hebrides: Australian Action and Initiatives,' Cabinet Memorandum 829, 2.

<sup>107</sup> Steven R Fischer, *A history of the Pacific Islands* (Palgrave Macmillan 2002) 249-250.

<sup>108</sup> The increasingly 'fractionalised' party system has seen coalition governments become a permanent feature in Vanuatu and there were at least 16 changes of government between 1991 and 2004: Jon Fraenkel, 'Political Consequences of Pacific Island Electoral Laws' (2005) Australian National University School of Pacific and Asia Studies Discussion Paper 8/2005, 7.

<sup>109</sup> Howard Van Trease (n 19) 247.

<sup>110</sup> The 'coconut war' as it was nicknamed, came to an end after Stevens' son was shot at a Papua New Guinean roadblock in late August 1980 and Stevens surrendered. Stevens remained in prison until 1991: Howard Van Trease (n 19) 258.

<sup>111</sup> Sam Alasia, 'Party Politics and Government in Solomon Islands' (1997) Australian National University School of Pacific and Asia Studies Discussion Paper 7/1997.

<sup>112</sup> This part of the Constitution is commonly referred to as a preamble, but as the paragraphs in question contain underlying principles and philosophies and use the words 'declare', 'agree and pledge' in capital letters, they might perhaps be more correctly referred to as the 'Declaration, Agreement and Pledge'. The Court of Appeal of Solomon Islands has recently stated that the Preamble is a statement of national aspiration, without juridical force, providing guidance only: *K'Clay v Attorney General* (Unreported, Court of Appeal, Solomon Islands, Goldsbrough P, Williams, Ward, JJA, 9 May 2014) [15] available via [www.pacilii.org](http://www.pacilii.org) at [2014] SBCA 2.

<sup>113</sup> Kenneth Brown, 'Customary Law in the Pacific: An Endangered Species' (1999) 3 *J South Pac Law*, Art 2, 1.

challenges of such pluralism were largely unaddressed, leading to perplexing problems. In particular, the provisions generally applying customary laws are ambiguous. Article 95(3) states that customary laws 'shall continue to have effect as part of the law of the Republic of Vanuatu.' Article 47(1) states that:

If there is no rule of law applicable to a matter before it, a court shall determine a matter according to substantial justice and whenever possible in conformity with custom.

If this section is read to mean that custom is only to be considered if there is no rule of (state) law applicable, and where substantial justice permits, then it could be viewed as restricting the application of Article 95(3). However, Article 47 could be read together with Article 95(3) to mean that all decisions are to be made in conformity with any relevant custom, except where there is some specific reason making this impossible, for example where it conflicts with a fundamental right. Given the nationalism prevailing at Independence, it might seem likely that the Constitutional Drafting Committee intended this broader meaning. However, the key phrases appear almost as an afterthought, with an unclear relationship to the preceding words of the Articles.

There are no express limitations placed on the application of customary laws in Article 95(3). However, as the Constitution is declared by Article 2 to be the supreme law of Vanuatu, customary laws are viewed as subject to its provisions, including the fundamental rights and duties in Chapter 2.<sup>114</sup> The Constitution also authorises Parliament to enact legislation, and although it is not expressly stated, the courts view customary laws as subordinate to those Acts.<sup>115</sup>

Further down the hierarchy, things become rather murky. Article 95(1) and (2) state that, until otherwise provided by Vanuatu's Parliament, laws in force immediately before Independence continue to apply. As explained above, laws in force include colonial laws and introduced laws. Colonial laws apply 'as if they had been made in pursuance of the Constitution',<sup>116</sup> which gives them the same status as Acts of Vanuatu's Parliament and therefore appears to give them precedence over customary laws. Less certain is the relationship between customary laws and introduced laws.<sup>117</sup> The Constitution provides that British and French laws<sup>118</sup> 'continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.'<sup>119</sup> Again, the reference to custom

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<sup>114</sup> *Public Prosecutor v Kota* (1989-94) 2 Van LR 661.

<sup>115</sup> See, eg, *Public Prosecutor v Kota* (1989-94) 2 Van LR 661; *Public Prosecutor v Silas* (1993) 2 Van LR 659.

<sup>116</sup> Constitution of Vanuatu 1980, art 95(1).

<sup>117</sup> For further discussion of the relationship between customary law and the other laws in force in Vanuatu, see [reference deleted for author anonymity].

<sup>118</sup> Whilst French civil law continues to apply, the predominance of the British administration at independence, discussed above, led to a common law framework of courts and adjectival laws.

<sup>119</sup> Constitution of Vanuatu 1980, art 95(2).

appears almost an afterthought and it is unclear whether introduced laws are to apply in preference to custom, or whether they must give way if incompatible with custom, unless there is some specific reason why this is not possible. Thus, the Constitution places customary laws in an uncertain position in the hierarchy and, as discussed later, the courts have been left to grapple with this.<sup>120</sup>

Vanuatu's Constitution goes further by providing for the inclusion of traditional leaders in national government through a National Council of chiefs ('the Malvatumauri').<sup>121</sup> This is not a traditional body, but is composed of custom chiefs elected by their peers sitting in District Councils of Chiefs.<sup>122</sup> The Malvatumauri determines its own procedure,<sup>123</sup> but must meet at least annually.<sup>124</sup> Opinions and votes in the Council are privileged.<sup>125</sup> The Malvatumauri has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of Ni-Vanuatu culture and languages.<sup>126</sup> It 'may be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament.'<sup>127</sup> Article 31 provides that Parliament is to provide for the organisation of the Malvatumauri. Basic provision was made by the National Council of Chiefs (Organisation) Act 1985, including that 'the rules, functions, duties and obligations of customary chiefs at village, island and regional levels' were to be determined by the 'customary law of Vanuatu in so far as it has not been repealed or modified by written law'.<sup>128</sup> In 2006 a more elaborate framework was provided,<sup>129</sup> under which the Malvatumauri became an umbrella body overseeing two other levels of councils, namely, the Island and Urban Councils of Chiefs. Between one and three Island Councils are established on each of Vanuatu's Islands, and an urban council in Port Vila (the capital) and in Luganville (the main town on Espiritu Santo). The functions of the Councils (including resolution of disputes according to, and promotion of, custom) are carefully set out.<sup>130</sup>

The detail provided for the organisation of the Councils arguably takes them further away from traditional processes. For example, the Act provides for the

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<sup>120</sup> For further discussion of the relationship between customary law and the other laws in force in Vanuatu, [reference deleted for author anonymity].

<sup>121</sup> Constitution of Vanuatu 1980, ch 5. The term 'National Council of Chiefs' was amended to 'Malvatumauri Council of Chiefs' by Constitution (Sixth) (Amendment) Act 2013 (Van).

<sup>122</sup> Constitution of Vanuatu 1980, art 29(1).

<sup>123</sup> *ibid* art 29(2)

<sup>124</sup> *ibid* art 30.

<sup>125</sup> *ibid* art 32.

<sup>126</sup> *ibid* art 30(1).

<sup>127</sup> *ibid* art 30(2).

<sup>128</sup> National Council of Chiefs (Organisation) Act 1985 (Van) s 3.

<sup>129</sup> National Council of Chiefs Act 2006 (Van).

<sup>130</sup> *ibid* s 13(1): '(a) to resolve dispute according to local custom; (b) to prescribe the value of exchange of gift for a custom marriage; (c) to promote and encourage the use of custom and culture; (d) to promote peace, stability and harmony; (e) to promote and encourage sustainable social and economic development; (f) to undertake such other functions as are conferred on them under this Act or any other Act.'



National Council to have an elected Chairperson and for the appointment of a Chief Executive officer.<sup>131</sup> Elected positions and external appointments may be seen as running counter to Pacific traditions of consensus and compromise and a catalyst for social tensions. Some imposed procedures might be more appropriate than they first appear (e.g. election may accord with selection of chiefs on merit over lineage).<sup>132</sup> Yet in broad terms introduced process very likely contributes to the reality, particularly in rural areas, that many communities live with little reference to laws and institutions beyond their custom.

The Constitution enhances the Malvatumauri's role by providing that Parliament must consult this body on certain customary land matters.<sup>133</sup> This has recently been strengthened to require consultation before any change to Vanuatu's land law.<sup>134</sup> The Malvatumauri and Island Councils of Chiefs are also given a supervisory role in the land dispute resolution process.<sup>135</sup>

In addition to these provisions and the general Articles 95 and 47, the Constitution makes special provision to ensure that land is governed by customary laws. Article 73 provides that all land in the Republic belongs to the 'custom owners'. Under Article 75 '[only] indigenous citizens ... who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership ...'. And while customary land may be transferred to other Ni-Vanuatu if customary laws permit, and provided the process accords with customary laws,<sup>136</sup> transfers to non-Indigenous citizens or to foreigners are only allowed in the form of a lease.<sup>137</sup> Further, land transactions between an Indigenous citizen and a non-Indigenous citizen or non-citizen are only permitted with government consent.<sup>138</sup> Consent is prohibited if the transaction is prejudicial to indigenous or national interests.<sup>139</sup> As a result of these provisions, 98% of land is under customary tenure.<sup>140</sup> Article 74 provides that 'the rules of custom shall form the basis of ownership and use of land'. Accordingly, disputes concerning customary land are to be determined in accordance with customary laws. However, land disputes are common and, as discussed further below, the pathways for resolving these have been a subject of contention.

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<sup>131</sup> *ibid* ss 6 and 15.

<sup>132</sup> The existence of the chiefly system in Vanuatu is itself a matter of dispute: See, eg, Lissant Bolton, *Unfolding the Moon: Enacting Women's Kastom in Vanuatu* (University of Hawai'i Press 2003) 69.

<sup>133</sup> Constitution of Vanuatu 1980, art 76.

<sup>134</sup> *ibid* art 30.

<sup>135</sup> Customary Land Management Act 2013 (Van) s 7.

<sup>136</sup> Constitution of Vanuatu 1980, art 74.

<sup>137</sup> Land Leases Act 1983 [Cap 163] (Van).

<sup>138</sup> Constitution of Vanuatu 1980, art 79(1).

<sup>139</sup> *ibid* art 79(2): 'i.e., 'prejudicial to the interests of (a) the custom owner or owners of the land; (b) the Indigenous citizen where he is not the custom owner; (c) the community in whose locality the land is situated; or (d) the Republic of Vanuatu.'

<sup>140</sup> AusAID (ed), *Making Land Work* (AusAID 2008) vol 1, 4.

Whilst the Constitution declared the State to be founded on traditional Melanesian values and afforded some recognition to customary laws, as with Canada the difficult detail was largely left aside, in this case to be pursued by Parliament. The Constitution<sup>141</sup> provides in Article 51 that:

**Ascertainment of rules of custom**

(1) Parliament may provide for the manner of the ascertainment of relevant rules of custom except for the rules of custom relating to ownership of custom land, and may in particular provide for persons knowledgeable in such custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings.

As in Canada progress was slow; until recently little action had been taken to realise this provision. The parliamentary mandate was pursued only to provide for assessors knowledgeable in custom to sit with judges in the common law courts<sup>142</sup> (a practice which already existed under the old Protocols), and to provide the courts with such incidental power ‘as may be reasonably required in order to apply custom’. In 2006, the provision regarding assessors was repealed,<sup>143</sup> although the Island Courts Act still requires the Supreme Court to sit with assessors in appeals from Island Courts.<sup>144</sup> For over three decades, no attempt was made to address the more complex issue of how the ‘relevant rules of custom’ should be ascertained. As in Canada this fell to the courts in a necessarily ad hoc manner. Vanuatu’s Parliament has recently passed controversial legislation dealing with ascertaining rules of custom, but only in relation to customary land. As discussed later, the legislation purports to return all decision making on land to customary forums.<sup>145</sup>

#### IV. THE INTERPRETATION AND IMPLEMENTATION OF CANADIAN ‘ABORIGINAL RIGHTS’

The Canadian constitutional recognition and affirmation of ‘existing Aboriginal rights’ (in s 35 of the Constitution Act 1982) was first explored in a series of fisheries prosecutions in the 1990s. Most importantly, in the 1996 decision of *R v Van der Peet*,<sup>146</sup> Lamer CJC<sup>147</sup> expounded that in order to be an ‘Aboriginal right’ protected by section 35 ‘an activity must be an element of a practice, custom or tradition integral to the distinctive [pre-contact] culture of the Aboriginal group claiming the right’.<sup>148</sup> With this complex formula the Canadian courts set out to

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<sup>141</sup> As amended in 2013: Constitution (Sixth) (Amendment) Act 2013 (Van) s 17.

<sup>142</sup> Courts Act Cap 122 (Van) s 14.

<sup>143</sup> Judicial Services and Courts Act 2006 (Van).

<sup>144</sup> Island Courts Act Cap 167 (Van) s 22(2). See also Civil Procedure Rules, Cap 270 (Van) r 16.34(6)(a).

<sup>145</sup> Customary Land Management Act 2013 (Van).

<sup>146</sup> *R v Van der Peet* (1996) 137 DLR (4th) 289.

<sup>147</sup> La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ concurring.

<sup>148</sup> *R v Van der Peet* (1996) 137 DLR (4th) 289, 310 (bracketed note added based on surrounding discussion in the judgment). For later restatements of the test, see, eg, *Minister of National*

navigate the modern confluence of legal systems. As we noted at the outset, this recent Canadian history is an important case study on the challenges of legal pluralism.

### *A. The assembly and application of the Van der Peet test*

The Supreme Court's first close examination of section 35 came in the 1990 decision of *R v Sparrow*<sup>149</sup> — a case concerning government power to regulate fishing by net length restrictions. The case focussed primarily on possible extinguishment or infringement of the Aboriginal rights in issue, clarifying that the new constitutional protection meant that any post section 35 'infringement' of 'rights' (and attendant traditions) must be 'justified' by reference to an exacting standard. Yet the broader difficulty of this legal confluence was already apparent. First, the Court largely avoided difficult questions about the evolution and modern exercise of Aboriginal traditions.<sup>150</sup> Secondly, the reasoning raised the possibility that the constitutional protection covered only a *subset* of traditions (i.e. 'integral' ones). And thirdly, while the Court explained that the ambiguous word 'existing' in section 35(1) means 'unextinguished',<sup>151</sup> it has noted that this effectively consigns Aboriginal peoples and their rights to a 'frozen lake with two air holes placed centuries apart' — all rights were forcibly submerged for generations and only those that have made it to the second hole have now been recognised.<sup>152</sup> The Court was already grappling here with some of the key challenges identified at the beginning of this paper.

In the critical decision of *Van der Peet*, one of a 1996 trilogy,<sup>153</sup> Lamer CJC<sup>154</sup> built his 'integral to distinctive culture' test upon terminology from *Sparrow* and what he saw to be the 'purpose' of section 35 — namely:

...the protection and reconciliation [with Crown sovereignty] of the interests which arise from the fact that prior to the arrival of Europeans in North America Aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions.<sup>155</sup>

Lamer CJC felt that the test for section 35 Aboriginal rights must seek the 'crucial elements' of those pre-existing distinctive societies — i.e. the practices,

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*Revenue v Mitchell* (2001) 199 DLR (4th) 385 per McLachlin CJC at 400; and *R v Sappier; R v Gray* (2006) 274 DLR (4th) 75 (discussed below).

<sup>149</sup> *R v Sparrow* (1990) 70 DLR (4th) 385.

<sup>150</sup> *ibid* 402-3 (only food fishing was directly in issue).

<sup>151</sup> It did not mean to constitutionalise the regulations of 1982 and 'freeze' Aboriginal rights by reference to them: *R v Sparrow* (1990) 70 DLR (4th) 385, 396.

<sup>152</sup> Peter S Vicaire (n 48) 655.

<sup>153</sup> See also *R v NTC Smokehouse Ltd* (1996) 137 DLR (4th) 528; and *R v Gladstone* (1996) 137 DLR (4th) 648. See further *R v Cote* (1996) 138 DLR (4th).

<sup>154</sup> With whom La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ concurred.

<sup>155</sup> *R v Van der Peet* (1996) 137 DLR (4th) 289, 303, cf 309-10.

customs and traditions ‘central’ to the pre-contact<sup>156</sup> Aboriginal cultures.<sup>157</sup> The resulting ‘integral to distinctive culture’ test was, then, a quite historically-focused recognition of *some* traditional practices and attendant laws.

There were alternative views about the appropriate constitutional ‘reconciliation’. L’Heureux-Dubé J viewed the purpose of section 35 more as cultural and societal preservation, and hence focussed the test on the social and cultural significance of a practice, tradition or custom.<sup>158</sup> Her Honour was critical of a point in time (‘frozen right’) approach — preferring to require the activity to have been sufficiently significant and fundamental to the culture and social organisation of the group for a substantial continuous period of time.<sup>159</sup> McLachlin J sought to avoid ‘freezing’ rights by distinguishing between general ancestral rights and their modern exercise,<sup>160</sup> and requiring (without reference to dates) continuity between the modern practice and the laws and customs that ‘held sway’ before European ones.<sup>161</sup>

Difficult questions obviously arise about what is ‘integral’ or ‘significant’ and by whose measure. Moreover, the cogitation here on the temporal source, baseline scope and/or adaptability of ‘rights’ is important as regards the nature of section 35’s engagement with customary laws; is it seeking and preserving just the practices of pre-contact existence, or is it more fully recognising the customary laws and processes themselves? A broader definition of the ‘ancestral right’, or flexibility on the period of inquiry, avoids rather than answers this.

Lamer CJC’s ‘integral to distinctive culture’ test was confirmed and elucidated by majorities in two cases accompanying *Van der Peet* — *R v NTC Smokehouse* and *R v Gladstone*.<sup>162</sup> These three cases illustrate well the complexity and potential controversy of the test. The claims were characterised as assertions of a right to exchange fish (salmon or herring spawn) for money or other goods — however in *Gladstone* a broader ‘commercial’ classification was considered in the alternative.<sup>163</sup> Only in *Gladstone* was the claimed right (in fact

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<sup>156</sup> As to adaptation of the ‘pre-contact’ test for Métis claimants: see esp *R v Powley* (2003) 230 DLR (4th) 1.

<sup>157</sup> *R v Van der Peet* (1996) 137 DLR (4th) 289, 309-10.

<sup>158</sup> *ibid* 343-5.

<sup>159</sup> *ibid* 349.

<sup>160</sup> *ibid* 370-1, 373-4; cf also L’Heureux-Dubé J at 341-2. Lamer CJC himself noted that the particular action in question should be considered at a general level, and that the action may be the exercise in a ‘modern’ form of a pre-contact practice, tradition or custom: at 312-13.

<sup>161</sup> *ibid*, 373. Note the Supreme Court’s return to some aspects of these minority opinions in *R v Sappier*; *R v Gray* (2006) 274 DLR (4th) 75 (discussed below).

<sup>162</sup> *R v NTC Smokehouse Ltd* (1996) 137 DLR (4th) 528; *R v Gladstone* (1996) 137 DLR (4th) 648.

<sup>163</sup> In *Van der Peet* the action in question was the sale of 10 salmon for \$50 (considered not ‘commercial’) — characterised by Lamer CJC as the assertion of a right to exchange fish for money or other goods (which was sufficient to potentially impugn the government prohibition on all sale or trade of fish (at 321)). In *NTC Smokehouse*, the sale of 119,000 pounds of salmon by 80 group members was considered ‘much closer’ to ‘commerce’ but still notionally characterised

both classifications) found to be an element of a practice, custom or tradition integral to the distinctive pre-contact culture of the group.<sup>164</sup> It was emphasised (given there had also been pre-contact exchanges in the other cases) that it must be one of the things that ‘truly made the society what it was’, as opposed to incidental or occasional activities.<sup>165</sup>

A fourth decision in 1996, *R v Pamajewon*,<sup>166</sup> concerned an asserted right to operate and regulate high stakes gambling on a reservation — and therefore raised difficult questions of customary law recognition and self-governance more directly.<sup>167</sup> The Court was prepared to assume (without deciding) that section 35 could include rights of ‘self-government’, but found that the specific rights asserted here were not made out on the evidence and the exacting *Van der Peet* test.<sup>168</sup>

Canadian government policy later recognised an ‘inherent right of self-government’ as a potential section 35 right (with cross-reference to *Van der Peet* language), and that such a right ‘may find expression in treaties’ and ‘in the context of the Crown’s relationship with treaty First Nations’.<sup>169</sup> Yet this policy, although laudably driven by the goals of building stronger communities and dismantling old Indian Act restrictions, was the product of years of contention and was carefully hedged. The recognition of self-government over the ‘special relationship’ to land and resources was (by glossary) limited essentially to reserve and relevant agreement lands (as opposed to traditional lands more broadly); the right to self-government was said to operate within the constitutional ‘framework’ and therefore required harmonious ‘cooperative arrangements’ with other governments; and this

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by Lamer CJC as one to exchange fish for money or other goods (if this failed the test a claimed right to fish commercially would necessarily also fail (at 536-7)). In *Gladstone*, which concerned attempted sale of 4200 pounds of herring spawn on kelp, Lamer CJC noted the difficulty of characterising and preferred to address both possibilities: the right to exchange for money or other goods, and the right to sell commercially (at 659-60).

<sup>164</sup> *R v Van der Peet* (1996) 137 DLR (4th) 289, 313-14, 315. And see generally *Van der Peet* at 325-6; *R v NTC Smokehouse Ltd* (1996) 137 DLR (4th) 528, 539; and *R v Gladstone* (1996) 137 DLR (4th) 648, 661-2.

<sup>165</sup> *R v Van der Peet* (1996) 137 DLR (4th) 289, 313-14, 318.

<sup>166</sup> [1996] 2 SCR 821.

<sup>167</sup> For commentary see Peter Hogg and Mary Ellen Turpel, ‘Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues’ (1995) 74 Can B Rev 187; John Borrows, ‘Indigenous Legal Traditions in Canada’ (2005) 19 J L & Pol’y 167, 204-6; Kent McNeil, ‘Judicial Approaches to Self-Government since Calder: Searching for Doctrinal Coherence’, in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right be Done, Aboriginal Title, the Calder Case and the Future of Indigenous Rights* (UBC Press 2007) 129.

<sup>168</sup> At para [24]-[30]. A challenge of a different kind is found in the minority (but concurring) judgment of Binnie J in *Mitchell v MNR* [2001] 1 SCR 911. In the context of a claim effectively to international trading rights, Binnie J proffered that incompatibility with Canadian sovereignty (where a legal monopoly over certain activities was necessary) could be a limitation on s 35 recognition — albeit in a limited category of cases: at para [150]ff. See also Aaron Dewitt (n 63) 211ff.

<sup>169</sup> Indigenous and Northern Affairs Canada, ‘The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government’ (September 2010) <<https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>>(often referred to as the ‘Inherent Right Policy’).

right was said not to include a 'right of sovereignty' in the international law sense.<sup>170</sup> As noted earlier in this paper, broad or specific self-government agreements can be negotiated as part of a larger comprehensive land claim process,<sup>171</sup> or as a stand-alone agreement (often in the context of a reserve).<sup>172</sup>

The controversies of *Van der Peet* returned to the Supreme Court in 2006. In *R v Sappier*<sup>173</sup> 'Aboriginal rights' had been raised in defence to prosecutions for unlawful cutting of timber. The Crown argued that while pre-contact timber usage may have been important for survival it was not established to be a defining practice, custom or tradition that 'truly made the society what it was'.<sup>174</sup> Yet the Court,<sup>175</sup> having characterised the claimed right as one to harvest wood for domestic uses,<sup>176</sup> was prepared to infer from evidence on the importance of the resource that the *practice* of harvesting was also significant.<sup>177</sup> Notably, it rejected the view that practices merely for 'survival' could not satisfy *Van der Peet*<sup>178</sup> – in the process revisiting comments in earlier decisions.<sup>179</sup> The Court was also concerned this time to accommodate 'evolution' of activities — to not 'freeze the right in its pre-contact form'.<sup>180</sup> Here, the right to harvest wood was allowed to evolve into a right to harvest wood by modern means for modern dwellings.<sup>181</sup>

The outer edges of section 35 were found again in the 2011 case of *Lax Kw'alaams Indian Band v Canada (Attorney General)*.<sup>182</sup> In response to an assertion of fishing rights on the northwest coast, the Court held that the established practices, customs and traditions of the pre-contact society did not support a contemporary right to broad commercial fishing: the sporadic historical

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<sup>170</sup> Recent statements of policy – in the form of Attorney General 'Principles' and 'Directives' – are discussed below.

<sup>171</sup> See eg Nisga'a Final Agreement 11 May 2000 and the decisions of *Campbell v British Columbia* [2000] 4 CNLR 1 (BCSC); and *Chief Mountain v Canada* 2013 BCCA 49.

<sup>172</sup> Government of Canada, 'General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations' (2015) <<http://www.aadnc-aandc.gc.ca/eng/1373385502190/1373385561540>>. See also Government of Canada, 'Self-government' (7 December 2018) <<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>>.

<sup>173</sup> *R v Sappier; R v Gray* (2006) 274 DLR (4th) 75.

<sup>174</sup> The Court acknowledged the lack of evidence on the actual *practice* relied upon (as opposed to the importance of the resource): at [21]ff.

<sup>175</sup> Bastarache J (McLachlin CJC, Lebel, Deschamps, Fish, Abella, Charron and Rothstein JJ concurring); Binnie J (substantially in agreement) delivering a short separate judgment.

<sup>176</sup> *R v Sappier; R v Gray* (2006) 274 DLR (4th) 75, [24]-[25]. Note that Binnie J was disinclined to exclude barter or sale within the relevant community from the scope of the contemporary right: at para [74].

<sup>177</sup> *ibid* [93]ff.

<sup>178</sup> The Court relied (eg) on *R v Adams* (1996) 138 DLR (4th) 657.

<sup>179</sup> The Court also acknowledged concerns about the *Van der Peet* test in academic commentary and the original dissenting judgments: at [42]ff. It was still noted however that there is no aboriginal 'right to sustenance' per se — rather the traditional means of sustenance can in some cases be protected: at para [37].

<sup>180</sup> *R v Sappier; R v Gray* (2006) 274 DLR (4th) 75, [48].

<sup>181</sup> *ibid*.

<sup>182</sup> [2011] 3 SCR 535.

*trade* in fish (bar one specific product) was found to be peripheral and non-defining.<sup>183</sup> It was noted that while evolution was possible (in subject matter and method),<sup>184</sup> the modern claim as framed lacked ‘continuity and proportionality’ — being qualitatively and quantitatively different to the pre-contact trade.<sup>185</sup> A late-added lesser claim (framed in terms of a right to a ‘prosperous economy’) was rejected for both substantive and procedural reasons,<sup>186</sup> and the residual claim to a fishery for ‘food, social and ceremonial’ purposes was considered uncontentious and not worthy of any declaration.<sup>187</sup>

The legal and moral logic of the ‘integral to distinctive culture’ test has been hotly debated; key concerns being its propensity to ‘moor’ Aboriginal rights to the past and its awkward search for the ‘integral’ features of ‘distinctive’ cultures.<sup>188</sup> Most importantly, these cases illustrate well some of the intractable difficulties of legal pluralism in operation — and the added challenges of constitutional context. The courts were given no map for this legal journey, and they candidly pursued a controversial compromise in the constitutional provisions.

### *B. The recovery of ‘Aboriginal title’*

One year after *Van der Peet*, the Supreme Court carved out of the new ‘Aboriginal rights’ methodology a revised notion of ‘Aboriginal title’. *Delgamuukw v British Columbia*,<sup>189</sup> concerned a more comprehensive claim than the fisheries cases. Lamer CJC<sup>190</sup> explained that common law Aboriginal title is protected ‘in its full form’ by section 35(1)<sup>191</sup> — as a distinct species of ‘Aboriginal right’ arising from a sufficiently significant connection with land.<sup>192</sup> It is established, essentially, upon proof of exclusive occupation (by reference to physical occupation and systems of Aboriginal law) at the point of acquisition of sovereignty.<sup>193</sup> And this title confers a right to the land itself (and its use for a variety of purposes), subject to the limitation that uses must not be ‘irreconcilable’ with the nature of the attachment to the land.<sup>194</sup>

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<sup>183</sup> Per Binnie J (delivering the judgement of the Court).

<sup>184</sup> *Lax Kw'alaams Indian Band v Canada (Attorney General)* [2011] 3 SCR 535, [49].

<sup>185</sup> *ibid*, see esp at paras [8], [30], [56], [58].

<sup>186</sup> *ibid* [62]ff.

<sup>187</sup> *ibid* [14].

<sup>188</sup> See eg Kenji Tokawa, ‘Van der Peet turns 20: Revisiting the Rights Equation and Building a new test for Aboriginal Rights’ (2016) 49 UBCLR 817; Peter S Vicaire (n 48); John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (n 78) 60; Bradford W Morse, ‘Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*’ (1997) 42 McG LJ 1011.

<sup>189</sup> *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

<sup>190</sup> Cory, Major and McLachlin JJ concurred.

<sup>191</sup> *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193, 249-50.

<sup>192</sup> *ibid* 251.

<sup>193</sup> *ibid* 253.

<sup>194</sup> *ibid* 243.



Aboriginal law has a conspicuous role in this formula, albeit a somewhat ill-defined one.<sup>195</sup> Inevitably the courts have wrestled with the challenges of pluralism in this context also. The ‘irreconcilable uses’ limitation, drawn in part from constitutional ‘purpose’ and so an awkward overlay on common law principle,<sup>196</sup> was considered by some key observers to be somewhat preservationist and paternalistic.<sup>197</sup> When the Supreme Court itself returned to this issue in 2014,<sup>198</sup> it was careful to emphasise that this restriction emerged from the ‘collective’ nature of Aboriginal title, which is held for the present *and all succeeding* generations.<sup>199</sup>

A more significant dilemma emerged around the assessment of original ‘occupation’ and ‘exclusivity’ under the *Delgamuukw* test, and particularly the extent to which Aboriginal laws and perspectives influence that assessment. Lamer CJC in *Delgamuukw* was ostensibly relativist in his approach (reminiscent of early US cases) — accommodating the potential selectivity and intermittency of traditional land use<sup>200</sup> and noting the need to seek ‘exclusivity’ with sensitivity to Aboriginal perspectives.<sup>201</sup> In the 2005 decision of *R v Marshall; R v Bernard*,<sup>202</sup> a Supreme Court majority<sup>203</sup> cast doubt on this flexibility, apparently drawing the test back towards the tighter inquiries associated with general law ‘possession’ (such that seasonal hunting and fishing might typically translate as ‘rights’ rather than ‘title’).<sup>204</sup> Yet there was equivocation in this decision; the majority also emphasised the importance of the Aboriginal perspective (and specific land and group characteristics), and the imprecision of notions of ‘exclusivity’.<sup>205</sup>

The sequel to *Delgamuukw* was a long time coming, but in the interim the controversy around assessment of original ‘exclusive occupation’ (and the role of Aboriginal laws and perspectives) steadily grew. Ultimately this emerged squarely in the 2014 decision of *Tsilhqot’in v British Columbia*.<sup>206</sup> The Supreme Court<sup>207</sup> rejected a strict view that would result in only small pockets of ‘title’ surrounded by

<sup>195</sup> Alan Hanna, ‘Making the Round: Aboriginal Title in the Common Law from a Tsilhqot’in Legal Perspective’ (n 29).

<sup>196</sup> See [reference deleted for author anonymity].

<sup>197</sup> See eg Kent McNeil, ‘Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got it Right?’ (Robarts Lecture, Robarts Centre for Canadian Studies, York University, Toronto, March 25 1998) 12-13; Kent McNeil, ‘The Post-Delgamuukw Nature and Content of Aboriginal Title’ in Kent McNeil (ed) *Emerging Justice?* (Native Law Centre, University of Saskatchewan 2001) 102; John Borrows, ‘Sovereignty’s Alchemy: An Analysis of Delgamuukw v British Columbia’ (n 38).

<sup>198</sup> In *Tsilhqot’in Nation v British Columbia* 2014 SCC 44 (discussed further below).

<sup>199</sup> *Tsilhqot’in Nation v British Columbia* 2014 SCC 44, [74].

<sup>200</sup> *ibid* 256. Compare *La Forest J* at 281.

<sup>201</sup> *ibid* 258-60.

<sup>202</sup> *R v Marshall; R v Bernard* (2005) 255 DLR (4th) 1.

<sup>203</sup> McLachlin CJ, with Major, Bastarache, Abella and Charron JJ concurring.

<sup>204</sup> *R v Marshall; R v Bernard* (2005) 255 DLR (4th) 1, [48]-[70]. Contrast *Lebel J* (with whom Fish J concurred). For detailed critique of the majority reasoning, see Kent McNeil, ‘Aboriginal Title and the Supreme Court: What’s Happening?’ (2006) 69 Sask L Rev 281; Nigel Bankes, ‘Marshall and Barnard: Ignoring the Relevance of Customary Property Laws’ (2006) 55 UNBLJ 120.

<sup>205</sup> *R v Marshall; R v Bernard* (2005) 255 DLR (4th) 1, [45]-[70].

<sup>206</sup> 2014 SCC 44.

<sup>207</sup> The judgment of the Court was delivered by McLachlin CJ.

larger areas supporting only *Van der Peet* style specific ‘rights’. According to the Court, title could be established by proof of regular and exclusive use of territory (as opposed to intensive use of definite tracts with defined boundaries) — and this was to be assessed with due attention to Aboriginal culture and practices and might include tracts regularly used for hunting and fishing (etc) and over which the group exercised effective control.<sup>208</sup> This is a significant show of respect for Aboriginal histories, practices and attendant laws; Tsilhqot’in law was a ‘key ingredient’ in the case in the assessment of use and occupation.<sup>209</sup> The decision was of enormous significance for the non-treaty regions of Canada (particularly British Columbia).

### C. The section 35 protection

The broader dilemma thrown up by section 35 related to the nature of protection afforded to recognised ‘Aboriginal rights’ (and title). In the first place, as section 35 was located in Part II of the Constitution Act, it was apparently free of the ‘reasonable limits’ qualification and legislative override provisions applying to the new Charter of Rights and Freedoms (in Part I).<sup>210</sup> And section 25 (in Part 1) further provided that the Charter guarantees ‘shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada’.<sup>211</sup> The Charter principles of course reflect some of the more sacrosanct tenets of western law, and not surprisingly there has since been cogitation on whether section 25 should operate as an ‘absolute bar’ to Charter-based challenges to section 35 rights — or merely as an interpretative provision informing the construction of potentially conflicting rights. In the Supreme Court’s own brief consideration,<sup>212</sup> it was said that ‘these issues raise complex questions of the utmost importance to the peaceful reconciliation of Aboriginal entitlements with the interests of all Canadians... best left for resolution on a case-by-case basis’.<sup>213</sup>

Beyond this lingering structural uncertainty, bigger questions about the nature of section 35’s protection produced the most significant constitutional ‘compromise’ forged by the courts. The 1990 *Sparrow* decision had laid down a broad requirement that a post section 35 ‘infringement’ of these rights, once identified, must be ‘justified’. This entailed establishing a ‘valid legislative objective’ for the infringement, and that action was consistent with the ‘special trust

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<sup>208</sup> *Tsilhqot’in Nation v British Columbia* 2014 SCC 44, [50].

<sup>209</sup> John Borrows, ‘The Durability of Terra Nullius: Tsilhqot’in Nation v British Columbia’ (2015) 48 UBCLR 701, 717-18. See earlier, Alan Hanna, ‘Making the Round: Aboriginal Title in the Common Law from a Tsilhqot’in Legal Perspective’ (n 29).

<sup>210</sup> See ss 1 and 33.

<sup>211</sup> See further [reference deleted for author anonymity].

<sup>212</sup> See *R v Knapp* at [2008] 3 CNLR 346 at [64] per McLachlin CJ and Abella J (Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ concurring). Note the stronger position taken by Bastarache J, who suggested that that s 25 was a shield (providing priority), and not simply an interpretive tool: at [78]ff. See also on the provisions’ history: Peter S Vicaire (n 48) 657-58.

<sup>213</sup> *R v Knapp* at [2008] 3 CNLR 346, [65].

relationship' between the Crown and Aboriginal peoples (which would turn upon questions of proportionality, compensation, consultation, and priority in any conservation measures).<sup>214</sup> This initial test attracted controversy, but moreover it is often argued that in later cases the bar for 'justification' was noticeably lowered.<sup>215</sup> In *Gladstone*<sup>216</sup> and *Delgamuukw*,<sup>217</sup> the *Sparrow* notion of priority was diluted,<sup>218</sup> and what had been a search for a 'compelling and substantial' legislative objective (e.g., conservation or public safety) appeared to be eroded to one satisfied by industry or infrastructure development projects and general economic expansion.<sup>219</sup> In *Delgamuukw*, Lamer CJC again referred to section 35's purpose of 'reconciling' prior Aboriginal occupation with Crown sovereignty in supporting the broadening approach.<sup>220</sup>

Yet this issue, going to the priority accorded to the western law's own central purposes, proved not to be settled. According to the Supreme Court in *Tsilhqot'in*,<sup>221</sup> absent consent from Aboriginal title holders<sup>222</sup> 'justification' of incursion on title land would require the Crown to establish: 1) a proper discharge of its duty to consult and accommodate; 2) a compelling and substantial objective; and 3) consistency with the Crown's fiduciary obligation toward the group.<sup>223</sup> The first mentioned duty arises even where the Crown has just actual or constructive knowledge of the *potential* existence of Aboriginal title<sup>224</sup> (albeit that it varies according to the strength of the claim and seriousness of potential impact).<sup>225</sup> Further, and importantly, the 'compelling and substantial objective' must be considered from the Aboriginal perspective as well as that of the broader public.<sup>226</sup> Moreover, the Court said that the fiduciary obligation requires the Crown to respect the group and cross-generational nature of the title interest, and imports an obligation of 'proportionality' in the justification process.<sup>227</sup> These are significant hurdles for the Crown in any attempt to 'justify' infringement of Aboriginal title —

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<sup>214</sup> *R v Sparrow* [1990] 1 SCR 1075, 1113-1119.

<sup>215</sup> See further [reference deleted for author anonymity].

<sup>216</sup> *R v Gladstone* [1996] 2 SCR 723

<sup>217</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010

<sup>218</sup> *R v Gladstone* [1996] 2 SCR 723, 765ff; *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [168].

<sup>219</sup> See *R v Gladstone* [1996] 2 SCR 723, 74-75, *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1111.

<sup>220</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010, [165].

<sup>221</sup> 2014 SCC 44.

<sup>222</sup> Considered a logical concomitant of their right of control: *Tsilhqot'in v British Columbia* 2014 SCC 44, [76].

<sup>223</sup> *ibid* [77].

<sup>224</sup> As was the case here at the time the provincial government issued logging licences: *Tsilhqot'in v British Columbia* 2014 SCC 44, [93], [95]ff.

<sup>225</sup> *Haida Nation v British Columbia* [2004] 3 SCR 511, [39]

<sup>226</sup> *Tsilhqot'in v British Columbia* 2014 SCC 44, [81], [82].

<sup>227</sup> *ibid* [86], [87]ff, [126].

and the inter-generational equity that apparently underpins the ‘irreconcilable uses’ limit on Aboriginal title now appears to confine both parties.<sup>228</sup>

There was, however, a significant addendum to the Court’s revitalisation of the ‘infringement/justification’ test. It was decided that this regime applied to (and could be utilised for) *provincial* as well as federal infringement.<sup>229</sup> This has been controversial: seen by some to dismantle an important institutional buffer for Aboriginal communities,<sup>230</sup> yet by others as recognition of Aboriginal decision-making authority as against both levels of government.<sup>231</sup> Certainly the decision has prompted some ‘government to government’ style interaction between the province and community in this case.<sup>232</sup>

The ‘duty to consult’, refined and formalised in the *Tsilhqot’in* decision,<sup>233</sup> has become a lynchpin in the implementation of the constitutional compromise and navigation of competing legal perspectives. In this regard the courts have been called upon to consider further questions about whether breach of the duty can be relied on by individuals,<sup>234</sup> whether the duty applies at the law-making stage,<sup>235</sup> the reach of the duty and its ‘triggers’, the means and bodies by which the Crown can fulfil the duty, and the standard of consultation required.<sup>236</sup> There has also been related refinement and delimitation of the fiduciary duty owed by the government in certain contexts, and the broader responsibilities arising from the ‘honour of the Crown’.<sup>237</sup>

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<sup>228</sup> See eg Nigel Banks, ‘The Implications of the *Tsilhqot’in* (William) and *Grassy Narrows* (Keewatin) Decisions of the Supreme Court of Canada for the Natural Resources Industries’ (2015) 33 J En & Nat Res L 188. See further [reference deleted for author anonymity].

<sup>229</sup> In the process displacing the doctrine of interjurisdictional immunity as it related to the federal power over ‘Indians and land reserved’ under s 91(24) of the Constitution Act 1867.

<sup>230</sup> See eg John Borrows, ‘The Durability of Terra Nullius: *Tsilhqot’in* Nation v British Columbia’ (n 209) 734ff; Nigel Banks and Jennifer Koshan, ‘*Tsilhqot’in*: What Happened to the Second Half of Section 91(24) of the Constitution Act, 1867?’ (University of Calgary Faculty of Law, 7 July 2014) <<http://ablawg.ca/>>.

<sup>231</sup> Andreas Krebs, ‘This Aboriginal Case Should Help Dispel Colonial Attitudes’ (Huffpost British Columbia, 18 July 2014) <[http://www.huffingtonpost.ca/andreas-krebs/tsilhqotin-case\\_b\\_5596743.html](http://www.huffingtonpost.ca/andreas-krebs/tsilhqotin-case_b_5596743.html)>.

<sup>232</sup> Letter of Understanding *between* Xeni Gwet’in First Nations Government (“Xeni Gwet’in”), Tsilhqot’in National Government, on behalf of the Tsilhqot’in Nation and Her Majesty in right of the Province of British Columbia (10 September 2014) <<http://www2.gov.bc.ca/gov/DownloadAsset?assetId=9E9CC1D831664BF6AA8DEF4BE412FAD>>. See further [reference deleted for author anonymity].

<sup>233</sup> And the earlier decision of *Haida Nation v British Columbia* [2004] 3 SCR 511.

<sup>234</sup> I.e. as opposed to the collective – see *Behn v Moulton Contracting Ltd* [2013] 2 SCR 227 (a case concerning logging licences and their impact on treaty rights).

<sup>235</sup> See *Mikisew Cree First Nation v Canada (Governor General in Council)* [2018] 2 SCR 765.

<sup>236</sup> See *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* [2017] 1 SCR 1099. Cf (eg) *Clyde River (Hamlet) v Petroleum Geo-Services Inc* [2017] 1 SCR 1069. See also *Beckman v Little Salmon/Carmacks First Nation* [2010] 3 SCR 103 and *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* [2010] 2 SCR 650.

<sup>237</sup> See *Manitoba Metis Federation Inc v Canada (Attorney General)* [2013] 1 SCR 623; and *Lax Kw’alaams Indian Band v Canada (Attorney General)* [2011] 3 SCR 535.

As alluded to above, by the time of *Tsilhqot'in* the principles around Aboriginal title were building towards a species of self-government or 'jurisdiction'.<sup>238</sup> Aboriginal title now supports a range of uses over robustly-defined portions of traditional territory, with associated rights of collective decision-making over lands and resources,<sup>239</sup> and triggers nation-to-nation style engagement with governments in the context of infringement. With the *Tsilhqot'in* decision, and indeed growing political affirmation of the need for recognition, respect, co-operation and partnership (as reflected in recent Principles and Directives),<sup>240</sup> the country is at the top of a significant step forward in the meaningful accommodation of customary laws and processes — however clearly the challenges in this field are complex, and progress is always precarious.

## V. THE INTERPRETATION AND IMPLEMENTATION OF VANUATU'S CONSTITUTIONAL RECOGNITION

### A. *The Implementation of Recognition Provisions*

The problematic task of deciphering the constitutional recognition provisions has similarly been left to the courts in Vanuatu. Here we examine how the courts have approached the issues, commencing with the decision in *Banga v Waiwo*.<sup>241</sup> This case has been extensively traversed elsewhere,<sup>242</sup> but given that for some time it stood alone in its detailed consideration of customary laws in common law proceedings, it remains an important starting point. At first instance,<sup>243</sup> Lunabek Senior Magistrate ('SM') was called upon to determine the 'damages' for adultery to be paid to a spouse under the Matrimonial Causes Act.<sup>244</sup> The SM was faced with the complex hierarchy of laws laid down by the Constitution, and took the opportunity to review the place of custom. Acknowledging the Preamble, which founded Vanuatu society on 'traditional Melanesian values', he interpreted Article

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<sup>238</sup> See eg M Nickason, 'The Tsilhqot'in Decision: Lock, Stock and Barrel, Plus Self-Government' (2016) 49 UBCLR 1061; cf Gordon Christie, 'Who Makes Decisions over Aboriginal Title Lands?' (2015) 48 UBCLR 743; John Borrows, 'The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia' (n 209) 701; Val Napoleon (n 29); Jeremy Webber, 'The Public-Law Dimension of Indigenous Property Rights' in Nigel Banks and Timo Koivurova (eds), *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing 2013) 79.

<sup>239</sup> *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [15], [67]; M Nickason (n 238).

<sup>240</sup> See the 'Principles Respecting the Government of Canada's Relationship with Indigenous Peoples' (Department of Justice, 2017) and the 'Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples' (Department of Justice, 2019),

<sup>241</sup> (Unreported, Supreme Court, Vanuatu, Vaudin d' Imecourt CJ, 17 June 1996) available via [www.pacii.org](http://www.pacii.org) at [1996] VUSC 5.

<sup>242</sup> See, eg, [reference deleted for author anonymity].

<sup>243</sup> *Waiwo v Waiwo* (Unreported, Senior Magistrates Court, Vanuatu, Civ Cas 324/1995, 12 February 1996) 7.

<sup>244</sup> Cap 192.

95(2)<sup>245</sup> as restricting the continued application of British and French law to British and French subjects. He concluded that it did not apply to Ni-Vanuatu,<sup>246</sup> who were only subject to legislation passed by the Parliament of Vanuatu or declared by Vanuatu courts. If no such law existed, then customary laws would apply.<sup>247</sup> In this case, given the seriousness of adultery under customary laws, he awarded punitive damages.<sup>248</sup> Acknowledging the potential challenges of accurately ascertaining relevant customary laws, the SM noted (at least) that the court should not be bound to 'observe strict legal procedure or apply technical rules of evidence', but should consider all relevant evidence, including hearsay and opinion, and otherwise inform itself as it saw fit.<sup>249</sup>

Lunabek SM also considered the important question of how local variations were to be accommodated when multiple groups are involved. With increased mobility and inter-marriage, this is an important question for the courts. The SM suggested that where Ni-Vanuatu parties came from areas with different customs the court should search for a 'common basis or foundation' and turn that shared foundation into a rule.<sup>250</sup> Where only one of the parties was Ni-Vanuatu the court should consider both any applicable British or French law and applicable customary laws and 'apply the law relevant to the case.'<sup>251</sup> However, he did not expand on how that relevance might be determined. An answer may be found in the Underlying Law Act of Papua New Guinea, the successor to the Customs Recognition Act, which states that in deciding on which customary law to apply, 'the court shall have regard to (a) the place and nature of the transaction, act or event; and (b) the nature of residence of the parties.'<sup>252</sup>

This decision was appealed to the Supreme Court.<sup>253</sup> Whilst agreeing that Vanuatu's Matrimonial Causes Act should be interpreted differently from its English counterparts, and that punitive damages were available, Chief Justice Vaudin d'Imecourt disagreed with the reasoning underpinning the lower decision. His Honour contended that the constitutional drafters must have intended equality

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<sup>245</sup> Article 95(2) reads as follows: 'Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.'

<sup>246</sup> During the colonial period Ni-Vanuatu were governed by Joint Regulations, issued by the British and French authorities acting in concert.

<sup>247</sup> *Waiwo v Waiwo* (Unreported, Senior Magistrates Court, Vanuatu, Civ Cas 324/1995, 12 February 1996) 3.

<sup>248</sup> The SM went on to lay out broader principles for the application of customary laws, seemingly based on the 1963 Customs Recognition Act of Papua New Guinea. That Act was repealed in Papua New Guinea by the Underlying Law Act 2000 (PNG).

<sup>249</sup> *Waiwo v Waiwo* (Unreported, Senior Magistrates Court, Vanuatu, Civ Cas 324/1995, 12 February 1996) 10.

<sup>250</sup> *ibid* 4.

<sup>251</sup> *ibid* 7.

<sup>252</sup> Underlying Law Act 2000 (PNG) s 17.

<sup>253</sup> *Banga v Waiwo* (Unreported, Supreme Court, Vanuatu, Civ App 1/1996, 17 June 1996).

before the law,<sup>254</sup> and so Article 95(2) should be read as making British and French laws applicable to everyone in Vanuatu after independence. The Chief Justice held that the common law courts should use custom 'only in the event that there was no rule of law applicable to a matter before it.'<sup>255</sup> He justified this marginalisation by pointing out that custom varied widely across Vanuatu (not commenting directly on Lunabek SM's suggested way of dealing with conflicts), and that customary laws were difficult to ascertain because they were unwritten and judges and magistrates were not experts in all or any of the customs applying across Vanuatu.<sup>256</sup> On the question of proof, the Chief Justice observed only that although there might not be a need for strict rules, 'if and when the need arises to establish a particular custom, evidence must, nevertheless, be obtained and a clear custom must be established.'<sup>257</sup>

While the lack of Parliamentary provision on the application of unwritten and diverse customary laws does indeed make its application more complex, that does not overcome the apparent flaw in the Chief Justice's reasoning. This narrow view of Article 95(3) relegates customary laws to a law of last resort. This betrays the constitutional aspirations set out in the Preamble,<sup>258</sup> and ignores what was argued earlier to be the natural reading of Article 47(1), taken in context, requiring a court to determine matters 'whenever possible in conformity with custom.'

Lunabek SM later became Chief Justice of Vanuatu, leaving Pacific scholars eager for a case requiring reconsideration of these issues to come before him. Whilst this has yet to occur, the place of customary laws in the hierarchy was considered very recently by another Supreme Court judge. This case, *PP v Leo*,<sup>259</sup> is a rare example of a clear claim that the traditional system should prevail over the state system. The defendant was a chief and leader of the Tauraga Movement in North-Eastern Pentecost, an island far removed from the capital. He pleaded not guilty to charges of criminal misconduct including threatening to kill, malicious damage and arson – which arose from an incident in his village. As chief he had placed a *gorogoro* (ban) on collecting seafood from an area within the village boundary. Two villagers were accused of breaking this. According to the prosecution they denied this but nevertheless went to offer the defendant a tusked pig by way of apology, in response to which he allegedly berated them and took a shovel to their houses, threatening to shoot them if they did not leave the village. The villagers and their families abandoned their belongings and fled, following which the defendant and his followers allegedly looted and/or burnt their houses and gardens. In defence, it was contended that after the *gorogoro* was broken a customary court of five chiefs was convened and had imposed a customary penalty of 5,000 pigs, and that in default the villagers were to leave voluntarily or, as a last

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<sup>254</sup> *ibid* 7.

<sup>255</sup> *ibid* 5.

<sup>256</sup> *ibid* 4. Note also the consideration of evidential difficulties in Canada – eg in *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

<sup>257</sup> *Banga v Waiwo* (Unreported, Supreme Court, Vanuatu, Civ App 1/1996, 17 June 1996) 4.

<sup>258</sup> [reference deleted for author anonymity].

<sup>259</sup> [2018] VUSC 75.



resort, by a custom eviction. The defendant argued that as the fine was not paid and the villagers did not leave, what followed was all a part of the customary eviction process.

At a preliminary hearing, the defence argued that as the actions had been taken by the customary court, in accordance with customary laws, they were not justiciable under Vanuatu's written laws. The prosecution countered that the Court clearly had jurisdiction under the Penal Code. This led the Court again to questions about the hierarchy of laws in this legally and historically complex context. Wiltens J held that the Supreme Court did have jurisdiction, relying on Articles 47<sup>260</sup> and 49<sup>261</sup> of the Constitution, s 28 of the Judicial Services and Courts Act,<sup>262</sup> and s 1 of the Penal Code.<sup>263</sup> He concluded that, in the light of Article 47, the Court was compelled to determine the case according to law, which he took to mean the written law (for criminal acts the Penal Code and the Criminal Procedure Code). Wiltens J echoed the views of d'Imecourt CJ in *Banga*, stating '[c]ustomary considerations would only be a factor in the Supreme Court's considerations if there were no rules of law applicable to what it was determining'. However, His Honour went further in his relegation of customary laws:

Of the three bases on which the Court must make a determination, customary considerations are the least significant or compelling. The most compelling basis requires the Court to determine the matter in accordance with law; if no rules of law are in place, then the next basis of determination is substantial justice. If the matter is to be determined on the basis of natural justice, it is only then, if possible, that conformity with custom is to be considered.<sup>264</sup>

Thus, customary laws were not only relegated to the lowest position in the hierarchy, but also were to be taken into account only 'if possible', to interpret or apply substantial justice in a way which conformed with custom.

His Honour went on to deal with Article 95(3), which defence counsel appears to have suggested gave customary laws precedence over 'pre-independence foreign laws'.<sup>265</sup> As the Penal Code is a post-independence Act of Vanuatu Parliament, it is hard to see how this advanced the case and Wiltens J

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<sup>260</sup> Article 47 of the Constitution states that the 'function of the judiciary is to resolve proceedings according to law.'

<sup>261</sup> Section 49 bestows on the Supreme Court 'unlimited jurisdiction to hear and determine any civil or criminal proceedings'.

<sup>262</sup> Cap 270. Section 28 of the Judicial Services and Courts Act, goes further and provides that the 'Supreme Court has: (1) unlimited jurisdiction throughout Vanuatu to hear and determine any civil and criminal proceedings in Vanuatu, including matters of custom'. As discussed further below, customary land has been exempted from Articles 47 and 49, but not s 28, by a constitutional amendment in 2013.

<sup>263</sup> Cap 135. Section 1 of the Penal Code provides that the 'criminal law of the Republic shall apply to any act done or omitted within its territory'.

<sup>264</sup> *PP v Leo* [2018] VUSC 75, [31].

<sup>265</sup> *ibid* [22].

expressed himself to be unclear on this point.<sup>266</sup> However, he went on to deliver a further blow to the status of customary laws:

Article 95 of the Constitution was inserted ... to deal with transitional matters. What it plainly says is that customary law will continue to have effect as part of the laws of Vanuatu. Pre-independence, customary law played a relatively minor part in the way the laws were administered. Some thirty-eight years later, that continues to be the position. Article 95 was not ever intended to give greater prominence to customary considerations – just to maintain the status quo.

There has been no diminution of significance; neither has customary law taken on added significance; except in one area and that relates to ownership and use of land. Had Parliament wished, customary law in the area of alleged criminal misconduct could also have been devolved to the Chiefs – that has not occurred. There cannot be a clearer message of Parliament's intent than 38 years of silence in the face of many calls for change.<sup>267</sup>

This highlights the difficulties of giving meaning to broad recognition provisions in a constitution. In historical context the suggestion that Article 95 was only intended to be transitional and/or maintain the status quo is extraordinary. In fact, the reference to parliamentary intent is itself out of place in the interpretation of a constitution prepared by a Constitutional Committee,<sup>268</sup> and introduced by an exchange of notes between the two ruling colonial powers.<sup>269</sup> Equally problematic is the suggestion that Parliamentary inaction is evidence of a positive intention to marginalise customary laws. It seems more likely that this complex issue has for years occupied the 'too hard basket'. Further, in recent times, Parliament has taken action to respond to the 'many calls for change' acknowledged above. Whilst this related to land<sup>270</sup> rather than crime, that initial focus is explained by the fact that there is a specific constitutional mandate relating to customary land,<sup>271</sup> and it has long been at the top of the reform agenda.<sup>272</sup> The case also highlights the existence of a 'hybrid political order' in Vanuatu,<sup>273</sup> particularly in rural areas where communities often live largely by customary practice and norms, under traditional institutions, with minimal reference to introduced versions.

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<sup>266</sup> *ibid.*

<sup>267</sup> *ibid* [34], [35].

<sup>268</sup> The Constitution was appointed by a New Hebridean Government of National Unity in 1979.

<sup>269</sup> Exchange of Notes between the Governments of the United Kingdom and France (23 October 1979).

<sup>270</sup> Custom Land Management Act 2013 (Van).

<sup>271</sup> Constitution of Vanuatu 1980, arts 73-74, 78(2).

<sup>272</sup> Land reform is a dominant feature of the first strategic priority features, private sector development and employment creation: Government of the Republic of Vanuatu, Department of Economic and Sector Planning, Ministry of Finance and Economic Management, 'Priorities and Action Agenda 2006 – 2015: "An Educated, Healthy and Wealthy Vanuatu"' (June 2006) [2.2], [3.1.1].

<sup>273</sup> See further, Wesley Morgan, 'Overlapping authorities: Governance, leadership and accountability in contemporary Vanuatu' [2013] J South Pac Law A-1, A-10–A-14.

The Supreme Court has also imposed a broader limitation on the application of customary laws. In the 2011 decision of *Chief Poilapa v Masaai*,<sup>274</sup> the question arose whether the Court had jurisdiction to determine a dispute as to paramount chiefly title. The matter came on appeal from the Magistrates Court (upholding an Island Court decision on applicable custom). The Supreme Court has jurisdiction to hear appeals the Magistrates Court on questions of law, questions of fact, or questions of mixed law and fact.<sup>275</sup> Spear J held, without reference to Article 95, that he had no jurisdiction as custom did not come within any of those categories. Yet if customary law is neither law nor fact, nor a combination of the two, what exactly is it? Such confusion is not conducive to a meaningful accommodation of customary perspectives. Spear J's reasoning was not entirely clear. However, it seems that either the decision was made *per incuriam* on the basis of failure to take into account Article 95, or his Honour was distinguishing custom, as defined in the Interpretation Act,<sup>276</sup> from customary laws. As His Honour noted, the Act defines custom to mean 'the customs and traditional practices of the Indigenous peoples of Vanuatu'.<sup>277</sup> He did refer to Article 47(1), but appears to have been of the view that this only permitted orders relating to custom in exceptional circumstances.<sup>278</sup> Like the Supreme Court's decisions in *Banga v Waiwo*,<sup>279</sup> and *PP v Leo*,<sup>280</sup> this approach seems to ignore the aspirations in the prefatory part of the Constitution and fails to give full effect to the clear mandate in Article 95(3) that 'customary law shall continue to have effect as part of the law'. Even if customary 'laws' were somehow not at issue in this case, custom would surely be within the jurisdiction of the court as a question of fact.

### *B. The Implementation of Recognition Provisions Relating to Customary Land*

As noted in *PP v Leo*, customary laws have added significance in relation to land. The Constitution provides that 'the rules of custom shall form the basis of ownership and use of land',<sup>281</sup> but it did not originally provide where or how disputes should be resolved. In broad terms, where traditional leaders have been able to decide matters, the State has not interfered. Indeed, until repealed,<sup>282</sup> the

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<sup>274</sup> (Unreported, Supreme Court, Vanuatu, Spear J, 6 June 2011) available via [www.pacii.org](http://www.pacii.org) at [2011] VUSC 302.

<sup>275</sup> Judicial Services and Courts Act [Cap 270] (Van) s 30.

<sup>276</sup> [Cap 132].

<sup>277</sup> See Interpretation Act [Cap 132] (Van).

<sup>278</sup> *Tenene v Namak* (Unreported, Supreme Court, Vanuatu. Coventry J, 25 June 2003) available via [www.pacii.org](http://www.pacii.org) at [2003] VUSC, distinguished.

<sup>279</sup> (Unreported, Supreme Court, Vanuatu, Vaudin d' Imecourt CJ, 17 June 1996) available via [www.pacii.org](http://www.pacii.org) at [1996] VUSC 5.

<sup>280</sup> [2018] VUSC 75.

<sup>281</sup> art 74.

<sup>282</sup> Customary Land Tribunal (Repeal) Act 2013 (Van) s 1.

Customary Land Tribunal Act 2001 included some express, pragmatic deference to actual customary resolutions.<sup>283</sup>

However, as chiefs' decisions proved to be unacceptable to the 'losing' party with increasing frequency,<sup>284</sup> Parliament has made a number of attempts to provide avenues (outside of the common law courts) for disputes to be dealt with in accordance with customary laws. These efforts are a somewhat unique example of concerted parliamentary pursuit of constitutional promises of recognition. Originally, customary land disputes were dealt with through Island Courts,<sup>285</sup> established throughout Vanuatu by Chief Justice's warrant<sup>286</sup> and constituted by 'not less than three justices knowledgeable in custom ... at least one of whom shall be a custom chief residing within the territorial jurisdiction of the court'.<sup>287</sup> Island Courts decide cases in accordance with the 'customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order'.<sup>288</sup> One problem was that this placed Island Courts at the bottom of the hierarchy, marking customary cases as less important. Further, an appeal on decisions relating to customary land lay to the Supreme Court,<sup>289</sup> allowing an avenue back into the common law system. A vast number of cases were appealed, resulting in a decision by the Chief Justice in 2000 not to hear any more appeals.<sup>290</sup>

The Island Courts still deal with minor customary disputes, but are no longer the main avenue for land disputes. This jurisdiction was transferred to Customary Land Tribunals in 2001 by the Customary Land Tribunal Act.<sup>291</sup> This Act set up a complex hierarchy of tribunals within custom areas, constituted by village chiefs, to resolve customary land disputes.<sup>292</sup> Whilst appeal to a common law court was excluded,<sup>293</sup> this Act did not confer exclusive jurisdiction on the Tribunals. The common law courts retained jurisdiction to deal with disputes about leases of customary land and the Supreme Court had a power of review for lack of due process.<sup>294</sup> In practice a large number of cases, pending before the Island or

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<sup>283</sup> Cap 271 s 6(1). Presumably, the reason that this provision has not been included in the Custom Land Management Act 2013 (Van) (see below) is that the Act purports to use customary institutions to decide land matters.

<sup>284</sup> Evidenced by the large number of land cases brought before the Island Courts, which led to a huge backlog: Pacific Judicial Development Programme, 'Reducing Backlog and Delay Toolkit' (April 2015) 7.

<sup>285</sup> Island Courts Act Cap 167 (Van).

<sup>286</sup> *ibid* s 1.

<sup>287</sup> *ibid* s 3(1).

<sup>288</sup> *ibid* s 10.

<sup>289</sup> *ibid* s 22(1).

<sup>290</sup> Sue Farran, 'Fragmenting Land and the Laws That Govern It' (2008) 58 JLP 93, 98.

<sup>291</sup> Cap 271 ss 1(1), 2.

<sup>292</sup> Customary Land Tribunal Act 2001 (Van).

<sup>293</sup> *ibid* s 33.

<sup>294</sup> *ibid* s 39.

Supreme Courts in 2001, continued to be heard by Island Courts, with appeals still being heard by the Supreme Court.<sup>295</sup>

In 2013, the legal landscape was altered again by the Custom Land Management Act, which purports to allow customary institutions to make all decisions regarding customary land. This Act states in opening:

The Parliament of Vanuatu has formalised the recognition of customary institutions termed ‘nakamals’ and ‘custom area land tribunals’ in this Act to determine the rules of custom which form the basis of ownership and use of land in Vanuatu.

The Act provides for decisions of these bodies to become ‘recorded interests in land which are binding in law’. In a bold effort to exclude the common law courts (and to honour the specific constitutional mandate<sup>296</sup>) the Act purports to prevent them from reviewing decisions and from hearing appeals.<sup>297</sup> To avoid a challenge for unconstitutionality based on Chapter 8, which vests administration of justice in the judiciary<sup>298</sup> and confers unlimited jurisdiction on the Supreme Court,<sup>299</sup> the Constitution was itself amended.<sup>300</sup> A new sub-article provides that ‘[d]espite the provisions of Chapter 8 ... the final substantive decisions reached by customary institutions or procedures in accordance with Article 74,<sup>301</sup> after being recorded in writing, are binding in law and are not subject to appeal or any other form of review by any Court of law.’<sup>302</sup> Interestingly, the Judicial Services and Courts Act,<sup>303</sup> which echoes Article 49 of Chapter 8 (conferring unlimited jurisdiction on the Supreme Court), has not been amended. This could be argued to provide a way around the exclusionary provisions,<sup>304</sup> and conceivably even the constitutional exclusion might be circumvented, for example in the case of review for jurisdictional error.<sup>305</sup>

Following these amendments, subject to the drafting uncertainties noted, only nakamals and custom area land tribunals have jurisdiction to make decisions about customary land, with Island Courts (land) having jurisdiction to review in limited circumstances, including for lack of due process or fraud.<sup>306</sup> However, it

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<sup>295</sup> See, eg, *Manlaewia v Maripopongi* [2015] VUSC 119; *Uritalo v Chilia* [2016] VUSC 9; *Kwirinavanua v Tetrau* (Unreported, Court of Appeal of Vanuatu, Lunabek CJ, von Doussa, Asher, Aru, Chetwynd, Wiltens JJ, 27 April 2018).

<sup>296</sup> I.e. that ‘the rules of custom shall form the basis of ownership and use of land’: Constitution of Vanuatu 1980, art 74.

<sup>297</sup> Custom Land Management Act 2013 (Van) s 47(4).

<sup>298</sup> Constitution of Vanuatu 1980, art 47(1).

<sup>299</sup> *ibid* art 49(1).

<sup>300</sup> *ibid* art 78, as amended by Constitution (Sixth) (Amendment) Act 2013 (Van) sch, s 25.

<sup>301</sup> See above text [at fn 135](#).

<sup>302</sup> art 78(3), inserted by Constitution (Sixth) (Amendment) Act 2013 (Van) s 25.

<sup>303</sup> Cap 270 s 28.

<sup>304</sup> Custom Land Management Act 2013 (Van) s 47(4).

<sup>305</sup> See eg the logic applied in cases such as *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

<sup>306</sup> Custom Land Management Act 2013 (Van) s 45.

would be overstating the case to say that these reforms have returned decision making to traditional institutions.<sup>307</sup> Whilst the composition and procedure of the tribunals have been informed by customary practices,<sup>308</sup> they are not traditional but legislated bodies. Nakamals are customary institutions, but their composition and practices have changed over time and, according to research, they are not uniformly recognised as having authority to make decisions on customary land.<sup>309</sup> Further, the processes laid down by the Act are not customary. For example, if a nakamal has not determined ownership within thirty days the parties must be invited to submit to mediation, and if that fails they must apply to a custom area land tribunal to resolve the dispute.<sup>310</sup> Further, decisions must be recorded in writing at a central office and this constitutes evidence of customary title. This poses the risk that a parallel system of registration for customary land titles may result in conflicting titles. Government lands and justice department officials are also involved, resulting in a complex arrangement that is far removed from customary processes.

In practice, the Act has again failed to keep land cases away from the common law courts. This is highlighted by the recent judicial review in *Kwirinavanua v Tetrau*<sup>311</sup> which arose from a 2013 decision of the Efate Island Court regarding ownership of land. The Island Court was dealing with this matter because it had been filed in 1996, before jurisdiction was transferred to the Customary Land Tribunals and subsequently to the nakamals. Under the Customary Land Tribunal Act and the Custom Land Management Act, cases pending before the Island or Supreme Courts may not be dealt with under the new legislation without the consent of all parties.<sup>312</sup> The successful party in the Island Court, a representative of the Toumata Tetrau family (the 'Family'), wrote to the Custom Land Management Office Coordinator requesting a certificate of recorded interest. Some time afterwards a certificate was issued and in 2016 members of the Family were granted a negotiators' certificate<sup>313</sup> identifying the Family as

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<sup>307</sup> See further [reference deleted for author anonymity].

<sup>308</sup> A note to the Custom Land Management Act 2013 (Van) states, 'this Act provides for the identification of custom owners and the resolution of land disputes by customary institutions in accordance with the rules of custom in a nakamal or custom area land tribunal.'

<sup>309</sup> This unpublished research was undertaken in elective studies in Customary Land at the University of the South Pacific over a number of years from 2000 and although these students are by no means trained ethnographers their notes of interviews with local people provide some interesting insights into the plurality of customary land tenure in the country. See further, Sue Farran, 'Customs, Laws and Traditions: Bright Lines or Grey Areas?' in Alexis Albarian and Oliver Morétau (eds), *Le droit comparé et ... Comparative Law and ...*, Actes de la conférence annuelle de *Juris Diversitas* (Presses Universitaires d'Aix-Marseille 2016).

<sup>310</sup> Custom Land Management Act 2013 (Van) s 21.

<sup>311</sup> (Unreported, Court of Appeal of Vanuatu, Lunabek CJ, von Doussa, Asher, Aru, Chetwynd, Wiltens JJ, 27 April 2018).

<sup>312</sup> Customary Land Tribunal Act [Cap 271] (Van) s 5; Custom Land Management Act 2013 (Van) s 57.

<sup>313</sup> Only a certified negotiator may enter into negotiations dealing with customary land: Land Reform Act [Cap 123] (Van) s 6.

custom owners of the land.<sup>314</sup> However, on 9 November 2016,<sup>315</sup> the Coordinator received notification from Family Saurei that they had appealed the Island Court decision and in January 2017 on the basis of the unresolved appeal the Coordinator notified the Family that the certificate of recorded interest was cancelled. On judicial review the Supreme Court quashed the decision to cancel the certificate; directing the issue of a new one to the Family. The Coordinator appealed to the Court of Appeal, which held that the decision of the Island Court was not final as there was an appeal on foot, and upheld the Coordinator's power to set aside a certificate ('a document of limited importance in the scheme')<sup>316</sup> – a duty here where it had been wrongly issued. The Court ordered the substantive appeal to be continued before the Supreme Court.<sup>317</sup>

The parties to various cases pending before the Island or Supreme Courts are unlikely to consent<sup>318</sup> to their being dealt with under the new regime, given that legal representation is not allowed before a customary land tribunal<sup>319</sup> (or by implication a nakamal). And until final decisions are made there can be no recorded interest. At some time in the future one can assume that decisions relating to customary land will (subject to drafting uncertainties raised earlier)<sup>320</sup> be dealt with outside the common law courts. Whilst the new Act is far from perfect, it is a step forward in the meaningful recognition of customary laws and processes in relation to land.

## VI. CONCLUSION

As noted at the outset, there has for some years been a growing awareness of the inherent pluralism that underlies modern legal realities. Indigenous histories illustrate that customary laws have tended to be submerged, with air holes placed cautiously across the years for the western law's own specific purposes.<sup>321</sup> Yet understanding has deepened — understanding of the sophistication and resilience of Indigenous legal traditions,<sup>322</sup> of the profound legacies of colonialism, and of contemporary Indigenous needs and priorities. In this new setting it becomes ever clearer that western legal systems in fact *depend*, for their relevance and legitimacy, upon their reflexivity in accommodating other legal norms. It has been noted in the Canadian context that 'the validity of the law can no longer be

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<sup>314</sup> The certificate was issued as part of the registration of a negotiator under the Land Reform Act Cap 123. See further [reference deleted for author anonymity].

<sup>315</sup> The judgment lists this date as 9 November 2015, but this appears to be a typing error.

<sup>316</sup> *Kwirinavanua v Tetrau* (Unreported, Court of Appeal of Vanuatu, Lunabek CJ, von Doussa, Asher, Aru, Chetwynd, Wiltens JJ, 27<sup>th</sup> April 2018) [22].

<sup>317</sup> *ibid* [40].

<sup>318</sup> Custom Land Management Act 2013 (Van) s 57.

<sup>319</sup> *ibid* s 34(7).

<sup>320</sup> See particularly the Judicial Services and Courts Act Cap 270 (Van) s 28 (discussed above).

<sup>321</sup> Borrowing the analogy of Vicaire (quoted in context earlier): Peter S Vicaire (n 48) 655.

<sup>322</sup> Notably in Canada, see Law Commission of Canada, 'Justice Within: Indigenous Legal Traditions' (n 26); John Borrows, 'Indigenous Legal Traditions in Canada' (n 7); John Borrows, 'With or Without You: First Nations Law (in Canada)' (n 9) 663.



maintained via a single imperial voice'.<sup>323</sup> In Vanuatu, there is added reason for Ni-Vanuatu to have a significant voice, given that they form the vast majority of the population. The intractable difficulty is that while 'recognition' might be readily pronounced, meaningful accommodation of other legal traditions and their attending rights is a difficult undertaking.<sup>324</sup> For Indigenous legal traditions the challenge first requires a broad acknowledgment of the very different values and worldviews engaged,<sup>325</sup> as has been recognised in various countries.<sup>326</sup>

The Canada and Vanuatu examples, emerging from very different contexts, illustrate well many of the specific difficulties encountered in a pursuit of genuine legal pluralism. The challenges necessarily differ somewhat in each country, but ultimately they all reflect the struggle that ensues when one legal system re-surfaces in the path of another. This struggle is not just one of minority peoples, for as noted above Vanuatu has a large Indigenous majority. It is often also, perhaps primarily, the struggle of local traditions in the shadow of an international cultural and institutional hegemony.

Both Canada and Vanuatu have wrestled with the precise hierarchy of laws — in the context of a complex colonial history in Vanuatu<sup>327</sup> and most recently in the context of a delicate federal-provincial balance in Canada — and this warrants further close exploration in both jurisdictions. Both countries have dealt incompletely with the issue of whether and when customary principles might be subject to sacrosanct western tenets found in bill of rights-type provisions (or more amorphous notions of 'equality' before the law). Canada, in particular, has also grappled with what public interests might justify an exception to the protection of customary rights (and with what level of consultation). Both countries have struggled with 'process': e.g., whether prescribed processes are culturally consistent (or unduly intrusive), or indeed whether processes might lose authority (and be bypassed), atrophy with infrequent use, or in various ways be subsumed back into mainstream litigation. There are also problems with how customary laws and rights are framed (most acutely in Canada). These can arise from the difficulties of translation, local variation, past erosion and/or changed context — or indeed from the subjectivity of a western system that remains suspicious of adaptation and self-government aspirations. Constitutional context can exacerbate these challenges, obscure reform purposes and hinder resolution of disputes — via

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<sup>323</sup> Joshua Nichols, 'Claims of Sovereignty – Burdens of Occupation: William and the Future of Reconciliation' (2015) 48 UBCLR 221, 225.

<sup>324</sup> Kenneth Brown (n 113).

<sup>325</sup> Described as a 'social investment' in Alan Hanna, 'Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective' (n 29) 395.

<sup>326</sup> See eg *Re Willingal* [1997] PNGLR 119, 149 (Injia J): 'It seems ironic that traditional customs and customary practices of some ethnic societies should be struck down by the courts as being inconsistent with our national laws. They are inconsistent with a constitutional law or a statute or repugnant to general principles of humanity, when those very customs and customary practices have their own values in their respective ethnic societies.'

<sup>327</sup> See Jeremy MacClancy, *To kill a bird with two stones: a short history of Vanuatu* (Vanuatu Cultural Centre 1980); Howard Van Trease (n 19).

broad and aspirational drafting, the additional complexity of more legal ‘layers’, and/or greater public and political entanglement.

Most clearly, the Canada and Vanuatu examples illustrate that broad drafting and governmental inaction lead inexorably to the courts, leaving them the problem of devising a jurisprudence to accommodate the complex demands of pluralism. The courts will necessarily be incremental and ad hoc, and may be somewhat distracted by reconciliations with existing common law process and precedent. And there will very likely be ensuing debates about the cultural competence of legal professionals and the judicial conflation of legal, moral and political questions in the pursuit of such large issues – upon which, in the constitutional context, the courts might often be having something of a final say.<sup>328</sup>

The experiences of Canada and Vanuatu suggest that some specific initiatives might ease the difficulties in a confluence of legal systems. There might seem to be a need (for example) for greater precision in the drafting of key ‘recognition’ provisions, a more careful and collaborative process design, or more investment in studies of customary principles and their context. Yet many of the challenges defy any easy ‘fix’. They involve deeper disjunctions in understanding and purpose — and questions that are not easily answered. How are customary ‘laws’ or ‘rights’ extracted from very different, often deeply holistic worldviews and legitimately translated for western legal projects?<sup>329</sup> Is the western system to be rewarded for its own past undermining of customary practices? Can it claim some priority for its own central tenets and purposes? And what *is* the precise purpose and hence strength of ‘recognition’? Is it a mere acknowledgment or a true accommodation? And if the latter, is it a largely historical and perhaps transitional exercise, a restorative or preservationist western experiment, or a genuine attempt to make space for dynamic emanations of contemporary self-government?<sup>330</sup>

The ongoing struggles with such questions tell us that the collaboration essential to this undertaking must begin earlier and run deeper. Agendas need to be collaboratively re-opened, as even the championed concepts of ‘recognition’ and ‘reconciliation’ themselves proceed from western reference points (or perhaps harbour western defences).<sup>331</sup> Canada has been drawn backwards to a more significant collaboration (with a deepening focus on consultation and self-government) through torturous case law. Yet meaningful recognition of customary laws and rights can be a more deliberate course. Space can be made for co-reflection on purpose, co-design, mutual education, and genuine partnership in success and failure.<sup>332</sup> It would seem that this deeper collaboration, with real

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<sup>328</sup> See further (for example), as to whether such questions should be asked of courts, Law Reform Commission of Canada, ‘Justice Within: Indigenous Legal Traditions’ (n 26) 25.

<sup>329</sup> See eg Alan Hanna, ‘Making the Round: Aboriginal Title in the Common Law from a Tsilhqot’in Legal Perspective’ (n 29) 369.

<sup>330</sup> As to the specific importance of recognising law-making authority and dispute resolution bodies, see John Borrows, ‘Indigenous Legal Traditions in Canada’ (n 7) ch 6.

<sup>331</sup> See eg Kirsten Anker (n 30) 17-18.

<sup>332</sup> See broadly John Borrows, ‘Indigenous Legal Traditions in Canada’ (n 7) ch 6.

space for a resurgence of the traditional perspectives that western law seeks to animate for its own purposes,<sup>333</sup> is what will lead to clarity in drafting and process design (and wider acceptance of processes that are in place). It is this that will lead to informed balancing of competing interests, and ownership at higher levels of the challenges currently left to the courts. And ultimately it is this collaboration that can make the law properly responsive to the aspirations of all members of society, and indeed sustain the rule of law in the face of the pluralism inherent in contemporary legal realities.

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<sup>333</sup> See eg Alan Hanna, 'Making the Round: Aboriginal Title in the Common Law from a Tsilhqot'in Legal Perspective' (n 29) 369.